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IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

NO. 788

[redacted], BENJAMIN DRANOW,
[redacted],

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

NO. _____

JAMES R. HOFFA, BENJAMIN DRANOW, ZACHARY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT and CALVIN KOVENS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, BENJAMIN DRANOW, does hereby adopt, as his Petition, the Petition for Writ of Certiorari of JAMES R. HOFFA, ZACHARY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT and CALVIN KOVENS filed with this Court in this cause.

Respectfully submitted,
RAGANO & LaPORTE

BY: _____

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Benjamin Dranow

PROOF OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Petition have been furnished by mail this _____ day of September, 1970, in accordance with Rule 33(2)(a) to the Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D. C., 20530.

_____

Attorney

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 895

JAMES R. HOFFA, ZACHERY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT, AND CALVIN KOVENS, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 911

BENJAMIN DRANOW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals on remand (Pet. No. 895 App. 91–104, 104–117) are not yet reported. The opinion of the district court on remand (Pet. No. 895 App. 78–90) is reported at 273 F. Supp. 141. The original opinions of the court of appeals

(Pet. No. 895 App. 1–33, 34–71) are reported at 367 F. 2d 698, 716. The *per curiam* opinion of this Court remanding the case (Pet. No. 895 App. 74–77) is reported at 387 U.S. 231.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1968 (Pet. No. 895 App. 118). A petition for rehearing was denied on November 7, 1968 (Pet. No. 895 App. 119). On November 26, 1968, the Chief Justice extended the time for filing the petitions for writs of certiorari until January 6, 1968. The petition in No. 895 was filed on January 3 and the petition in No. 911 was filed on January 6, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government established that its case at trial was not tainted by the overheard Burris-Sigelbaum conversation.

2. Whether the petitioners were prejudiced at trial because they were not given access to certain documents in the government's possession.

3. Whether it was proper for the district court at the eavesdrop hearing to allow the government to rely upon affidavits to show the nonexistence of certain documents.

4. Whether it was proper for the district court to examine *in camera* certain overhearings of defendants which the government had represented to be wholly irrelevant to petitioners' convictions and to deny dis-

closure to the defense of such overhearings when the the court found that they were in fact irrelevant.

5. Whether the district court erred in refusing to order the government to produce any overhearings it might have involving defense counsel and whether petitioners were prejudiced because five overhearings of counsel of record not relevant to this case were disclosed to the court of appeals following oral argument.

6. Whether the district court acted within its discretion in finding petitioner Dranow competent to participate in the eavesdrop hearing.

7. Whether the temporary admission against petitioner Dranow of certain statements made by him deprived the other petitioners of their right to confrontation under *Bruton* v. *United States*, 391 U.S. 123, where this evidence was ultimately excluded as to all petitioners including Dranow (and the jury was so advised) and where Dranow was a witness in his own defense and was thus available for cross-examination by the other petitioners.

STATEMENT

I

INTRODUCTION

In August 1964, following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were found guilty of various counts of a 28-count indictment returned on June 4, 1963, charging wire and mail fraud in violation of 18 U.S.C. 1341 and 1343 in the procurement of loans from the Teamster Union Pension Fund and of conspiracy to commit these substantive offenses

(I D.A. 41–77, 28).[1] They were variously sentenced to fines and terms of imprisonment (I D.A. 31–32, III D.A. 2265–2267; see Government's Brief in Opposition in No. 1003, O.T., 1966, pp. 3–4, n. 3). On October 4, 1966 the court of appeals affirmed as to each petitioner, Judge Swygert dissenting (367 F. 2d 698, 716; Pet. No. 895 App. 1–33, 34–71). Thereafter, upon the government's disclosure in its response to the petition for a writ of certiorari (No. 1003, O.T., 1966) that it had overheard a conversation between defendant George Burris and one Benjamin Sigelbaum on December 2, 1963, in which Burris discussed certain matters relevant to this case,[2]

[1] In order to avoid confusion, our references to the extensive record in the case will be the same form as used by petitioners. Thus, "D.A." designates the three-volume appendix summarizing the trial transcript filed by petitioners on the original appeal; "G.A." is the 1-volume government's appendix in the original appeal; "H.D.A." refers to the three-volume appendix of the eavesdrop hearing held pursuant to the remand. "Tr." refers to the voluminous transcript of the original trial; and "H. Tr." designates the transcript of the eavesdrop hearing.

[2] At the time of the disclosure to this Court the government was proceeding under the policy of reviewing whether there had been prior instances in which an unlawful electronic surveillance had affected a case which had been brought to trial and of notifying the appropriate court whenever it discovered monitoring information which was arguably relevant to the litigation before the court. See the Government's Supplemental Memorandum in *Schipani* v. *United States*, No. 504, O.T., 1966; see also Memorandum for the United States in Opposition in *Kolod* v. *United States*, No. 133, O.T., 1967, pp. 3–5. *Cf. Granello* v. *United States*, 386 U.S. 1019, and the Brief in Opposition for the United States in that case, No. 750, O.T., 1966 at p. 19 n. 12.

This Court did not hold that the government was not authorized *ex parte* to make the determination of relevancy until long after the conclusion of the hearing in this case. *Kolod* v. *United States*, 390 U.S. 136, decided on January 29, 1968

this Court remanded the case to the district court for a hearing to determine whether that or any other electronically overheard conversation had tainted any of the convictions (387 U.S. 231; Pet. No. 895 App. 74–77). Following such a hearing the district court found no taint (273 F. Supp. 141; Pet. No. 895 App. 78–90). The court of appeals affirmed, Judge Swygert dissenting (Pet. No. 895 App. 91–104, 104–117).

II

THE ORIGINAL PROCEEDINGS CULMINATING IN THIS COURT'S ORDER OF REMAND

The evidence adduced at trial to support the charge of mail and wire fraud and conspiracy is fully detailed in the government's brief in opposition filed in response to the first petition for writ of certiorari in the October Term, 1966. We rely on that brief for the detailed presentation of the relevant facts (see government's brief in opposition in No. 1003, O.T., 1966, pp. 5–33, hereinafter "Br."). Here, we shall only summarize the nature of the crime and the purposes and roles of the various petitioners.

The core of the scheme proved at trial was the illegal procurement of money from the Teamster Pension Fund through the filing of fraudulent loan applications. The unlawful conduct of the petitioners was prompted by a need to extricate from financial difficulties Sun Valley, Inc., a Florida real estate corporation in which petitioners Hoffa, Burris and

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(pending on Motion to Amend Order of January 29, 1968, *sub nom. Alderman v. United States*, No. 133, O.T., 1967).

Dranow had substantial interests (Br. 6–9). To this end, falsely inflated loan applications were filed with the Pension Fund and money so obtained was diverted to the rescuing of Sun Valley and to the personal profit of the petitioners. The evidence showed that approval for these loans was obtained by exploiting petitioner Hoffa's position of dominance over the Board of Trustees of the Fund (*e.g.*, Br. 14, 16, 17, 18–19, 20, 23, 26). Hoffa was anxious to revitalize Sun Valley because of his own personal interest in that venture and because he had been harmed by the public disclosure of the involvement of Teamster funds in that failing enterprise (Br. 6–7, 8–9, 11–13). Dranow, Burris (and to a lesser extent Kovens) were variously Pension Fund "borrowers" (*e.g.*, First Berkely and Good Samaritan Hospital transactions, Br. 22–28), agents for the procurement of loans (*e.g.*, the Connelly-Everglades transaction, Br. 10–13), and participants in the rehabilitation of Sun Valley (Br. 9, 13, 24–25). In addition to their interest in rescuing Sun Valley, they were also motivated by a desire for personal enrichment (see, *e.g.*, Br. 11, 13, 14–15, 19). Strate and Hyman[3] were primarily borrowers from the Fund (Strate-Pelican transaction Br. 13–17; Hyman-Key West Foundation transaction, Br. 17–22) who, knowing of the overriding goal, joined the scheme with the understanding that to obtain loans for themselves and their projects, they would have to divert funds to Sun Valley (Br. 17, 19). Weinblatt participated as Dranow's alter ego in several transactions

[3] Hyman died some time prior to the eavesdrop hearing (see I H.D.A. 176–177).

(Br. 8–9).[4] As a result of petitioners' fraud on the Pension Fund, Sun Valley was rendered substantial financial assistance in its successful efforts to withdraw from bankruptcy proceedings (Br. 31–32) and petitioners themselves were personally enriched (*e.g.*, Br. 13, 17, 21–22, 23–25, 28).

III

THE HEARING HELD BY THE DISTRICT COURT

A. THE SCOPE OF THE HEARING

Pursuant to this Court's order remanding the case to the district court (*Hoffa* v. *United States*, 387 U.S. 231; Pet. No. 895 App. 74–77), hearings were held in the summer of 1967. Early in the hearing the court (Judge Austin) stated that, in the first instance, it would require the government to establish *prima facie* that the admittedly overheard Burris-Sigelbaum conversation of December 2, 1963, did not "taint" any of the convictions and that there were no other "electronic trespasses" which resulted in the obtaining of any evidence "which aided in the conviction in this case" (II H.D.A. 797, 793). The court deemed this latter category to include any electronically overheard conversations in which any of the defendants participated. Accordingly, it directed the government "to disclose what electronically eavesdropped conversations involving these defendants that there is a record of in the Federal Bureau of Investigation and in the Internal Revenue Department, * * *" (II

[4] Weinblatt's lesser role was recognized by the trial judge who sentenced him to 1 hour in the custody of the United States Marshal and to a fine of $5,000 (ID.A. 32).

H.D.A. 858; see also III H.D.A. 1365, 1430). When the defense objected to the fact that the government was not being directed at that time to disclose overheard conversations of lawyers, the judge responded that such disclosure was not within the ambit of this Court's order (II H.D.A. 857–858; see also III H.D.A. 1069). The court stated, however, that the defense would be permitted to "produce whatever evidence [it] can find in regard to electronic eavesdropping and the other defendants in this case, or the lawyers in this case, in which this trial was discussed, or preparations for this trial was discussed" (II H.D.A. 805–806, 807, 857–858).

B. THE EVIDENCE ADDUCED BY THE GOVERNMENT AT THE HEARING

1. Overheard conversations other than Burris-Sigelbaum

Government counsel represented to the district court that, in addition to the Burris-Sigelbaum conversation of December 2, 1963, it had in its possession nine logs of "certain isolated accidental and absolutely irrelevant overhearings of some of these defendants."[5] (II H.D.A. 849, 852–853; III H.D.A. 1524–1525). The government introduced into evidence an affidavit from Charles Bolz, Chief of the Accounting and Fraud Section of the F.B.I., to the effect that "diligent searches" of F.B.I. records regarding "elec-

[5] Government counsel advised the court that the discovery of such "trivial" items was the result of a "massive search" over a period of almost nine months (II H.D.A. 852).

tronic eavesdropping"[*] of conversations participated in by any of the defendants in this case, disclosed only the Burris-Sigelbaum conversation of December 2, 1963 and the conversations which were contained in sealed Exhibit 1-A (II H.D.A. 850-851, 863-864). This sealed exhibit, containing the logs of the nine conversations, was attached to the Bolz affidavit (II H.D.A. 851-852). The government turned over Exhibit 1-A to the court for an *in camera* inspection (G. Ex. 1-A, II H.D.A. 848-849). Following its inspection of all the logs contained in Exhibit 1-A, the district court concluded that they were "not remotely relevant" to the issues involved in the case and accordingly denied the defense request to examine them. The court further ordered that the logs be resealed and made available to the court of appeals on appeal (II H.D.A. 864-865).

An affidavit sworn to by Leon Green, Deputy Assistant Commissioner for Compliance of the Internal Revenue Service, was also read into the record. This affidavit stated that diligent searches of the files and records of the Internal Revenue Service had failed to disclose any electronic overhearings of the defendants (II H.D.A. 854-855). The court denied the defense request to strike the Bolz and Green affidavits (II

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[*] Government counsel pointed out that the term "electronic eavesdropping" was meant to include not "only bugging or the placing of an electronic device by trespass" but also "wiretapping" (II H.D.A. 865).

H.D.A. 855, 862–863), pointing out that no restrictions would be placed upon the defense calling these affiants as witnesses or otherwise endeavoring to establish the falsity of their affidavits (II H.D.A. 860–861). The defense never sought to call either Bolz or Green as witnesses.[7]

2. The Burris-Sigelbaum conversation

The government introduced into evidence all records it had of the December 2, 1963, conversation between petitioner Burris and Benjamin Sigelbaum—*i.e.*, a certified copy of the F.B.I. log of that intercepted conversation (G. Ex. 1, I H.D.A. 233–249; see II H.D.A. 820–823), and two memoranda summarizing the log—one dated December 26, 1963 (G. Ex. 3–1, I H.D.A. 253–257) and the other dated January 11, 1964 (G. Ex. 2–3, I H.D.A. 250–252).

a. The substance of the conversation as it appears in the log is as follows: Burris mentioned certain tax problems he had and requested that Sigelbaum buy out "some of his deals" (I H.D.A. 234). There then followed a short discussion of the political situation in Washington, D.C. (I H.D.A. 234). Burris returned to his personal financial problems, and mentioned the possibility of transferring a 10% interest in Sun Valley to Sigelbaum (I H.D.A. 234–235). The latter responded that he had a prior claim against that interest but had not pressed it because of his concern

[7] Joseph Harmon who, in 1963, was assistant Chief of the Intelligence Division of the Internal Revenue Service was called as a defense witness at the hearing and testified that to his knowledge there was no electronic eavesdropping or wiretapping of any conversations of the defendants in the instant case, from 1961 through 1964 (III H.D.A. 1421, 1425, 1436).

about getting Dranow into trouble since everyone wanted Dranow and Hoffa to get "straightened out" (I H.D.A. 235–236, see also I H.D.A. 239–240). Sigelbaum also spoke of an unnamed bank's claim against Sun Valley, and allowing it to precede his (I H.D.A. 235–236; see also I H.D.A. 242). Burris advised Sigelbaum that he had paid for his 10% Sun Valley interest by borrowing $57,000 from one Kipnis, which amount he later repaid from a fee he received from Kipnis. He said that they "were supposed to get another ninety thousand dollars" (I H.D.A. 236–237). Sigelbaum mentioned that he had tried to get Burris more money, which the latter would not accept (I H.D.A. 237). Sigelbaum referred again to his own and others' claims against Sun Valley and noted that "Willis" was the trustee of these claims (I H.D.A. 237–239). Sigelbaum referred to his "bail-out" of Dranow and Sun Valley, pointing out that others who knew nothing of this just sat back and made their profit (I H.D.A. 240–241). Burris said that he had given the bank $5,500 out of his personal account (I H.D.A. 243). When Sigelbaum inquired about the nature of the charges against Burris and how far he was involved, Burris replied that the government's case was not a good one but that the jury might conclude that where "there is smoke there must be some fire" (I H.D.A. 243–244). He said that the case had nothing to do with income tax and that his fee from the "Airport" was in the form of a check and he had reported it (I H.D.A. 244–245). Burris further stated that the government could not prove any fraud or conspiracy involving the Pension Fund because of the

strict manner in which the Fund was run (I H.D.A. 245–246). Sigelbaum then referred to "Bill Manheight" who, he said, was an attorney who had been interviewed by the FBI concerning his Pension Fund loan application and, who, Sigelbaum believed, would make an excellent defense witness (I H.D.A. 246–247, 248). Sigelbaum inquired about defendant Hyman and his Key West Foundation transaction. Burris responded that Hyman had used Pension Fund loans "a little bit differently" than he was supposed to but that he had ultimately spent the money on the property for which the loans had been obtained (I H.D.A. 248).

b. The government also introduced evidence as to the preparation and distribution of the log. It showed that a listening device had been installed by trespass in the Sigelbaum office in January, 1963 (III H.D.A. 1335–1339). The Burris-Sigelbaum conversation was monitored by F.B.I. Agent Fleck on December 2, 1963 (III H.D.A. 1168–1169). In accordance with normal practice, at the start of the conversation, Fleck activated a tape recorder and took hand-written notes. From the notes and tapes, he prepared a log which he turned over to his relief agent who, in turn, passed it on to Agent Swinney, his supervisor (III H.D.A. 1131–1133, 1168–1169, 1208–1209).[4] Swinney wrote the name of F.B.I. agent Connors on the first page of the log so that agent would see it since

[4] In accordance with usual practice the notes were destroyed and tapes erased after the log was prepared (III H.D.A. 1151–1152, 1171–1172, 1198–1199, 1203, 1250, 1336, 1345, 1348).

Swinney knew that Connors had "an investigation going concerning Sun Valley" (III H.D.A. 1342, 1356–1357; see also III H.D.A. 1269, 1384). Swinney did not discuss the contents of the log with Connors (III H.D.A. 1356–1357) and knew nothing of the substance of the Sun Valley investigation (III H.D.A. 1384–1385). Swinney also wrote on the log the name "Doerner" the F.B.I. agent in charge of the Sigelbaum investigation (III H.D.A. 1342, 1243–1244).

Agent Connors testified that he had seen the log, but not the notes nor the tapes from which the log was prepared (III H.D.A. 1046). Connors routed the log to agent Doerner, the next name on the list, and advised Doerner that the "George" mentioned in the log was George Burris (III H.D.A. 1045–1047, 1247–1248).[9] Doerner did not send the log on or discuss it with anyone but Connors (III H.D.A. 1248–1249, 1258).

Connors prepared two summary memoranda of the log, on December 26, 1963, and January 11, 1964,[10] and forwarded them to F.B.I. headquarters in Chicago and Washington, D.C. (III H.D.A. 1032–1033, 1051–1052). Connors did not forward either report to

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[9] The monitoring agent (Edward Fleck) had thought "George" was possibly George Simon (III H.D.A. 1176–1177).

[10] Connors testified that the second memorandum differed from the first in that it contained "administrative corrections"—*i.e.* it was written "in more general terminology, leaving out some of the direct quotations and excessive wording" (III H.D.A. 1058). The two memoranda are set out at I H.D.A. 251–252, 253–257.

government counsel and never discussed their contents with government attorneys or special investigator Walter Sheridan (III H.D.A. 1054–1056). Connors further testified that he had examined the files in the Miami office of the F.B.I. relating to this case for the period December 1, 1963 to the date of the hearing and that such examination revealed that no one had requested or conducted an investigation based on the log or the two memoranda he prepared therefrom (III H.D.A. 1160–1162; H. Tr. 1320). The January 11 memorandum was sent to the attention of Walter J. Sheridan, a special investigator of the Criminal Division of the Department of Justice (G. Ex. 2–3, I H.D.A. 250, III H.D.A. 1272–1273, 1276–1277).

Government trial attorney, William Ryan, testified that since his initials appeared on the routing slip attached to the January 11 memorandum, he apparently had seen a copy, although he had no independent recollection (III H.D.A. 1113–1115, 1117).[11] He had no recollection of discussing it with any other attorney involved in the prosecution of the case until sometime in 1967, long after the prosecution had been concluded (III H.D.A. 1118). He did not see the actual log of the conversation before 1967 (III H.D.A. 1109–1110). Ryan testified that his review of Department of Justice files for the period December 1, 1963 until the end of July 1964 (the verdict in the trial of this case was returned on July 26, 1964, I D.A. 28) showed that he never requested nor conducted an investigation based on the

[11] The December 1963 memorandum was not seen by government attorneys until after the trial (III H.D.A. 1059).

January 11, 1964 memorandum. To the best of his knowledge no one else requested such an investigation (III H.D.A. 1125–1126).[12]

c. The government also established in detail that it had independent sources for all the relevant facts mentioned during the overheard conversation.[13]

(1) The Burris, Dranow, and Hoffa interests in Sun Valley

The evidence as to Hoffa's financial interest in Sun Valley beginning in 1955 or earlier, his deposit of Teamster Union Funds in a "restricted" account in a Florida bank to secure $400,000 in loans made to Sun Valley by that bank, Sun Valley's financial difficulties, and the creation of Union Land & Home Company by Dranow and Burris to purchase a Sun Valley stock option from Hoffa and to rehabilitate Sun Valley, is fully detailed

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[12] Other government trial counsel—*i.e.*, Messrs. Poretz, Smith, Canavan, and McTiernan—had also been sent the January 11, 1964 memorandum shortly after its preparation and certain of them had written comments thereon (I H.D.A. 250–252, 126–127). The government sought to introduce the affidavits of every government attorney who came into contact with the January 11, 1964 memorandum to the effect that the information contained therein never provided any leads and that no governmental investigation was conducted based on it (III H.D.A. 1226–1227). The court sustained the defense objection to the admission of such affidavits (III H.D.A. 1242–1243).

[13] Most of this independent source material consisted of interviews conducted by government agents predating the Burris-Sigelbaum conversation. The agents who had conducted these interviews (including several with Burris and with Sigelbaum) testified that the documents the government introduced at the hearing to show independent source were the accurate reports they had prepared of such interviews (II H.D.A. 869–870, 884–886, 921–922, 932–934, 942–947, 965–972; III H.D.A. 1004–1007; see also II H.D.A. 882–884, 928–931).

in our original brief in opposition (Br. 6–9). Extensive information relating to these matters was in the government's possession long before the December 1963 conversation. This information derived, among other sources, from Burris' sworn testimony before a Senate (McClellan) Committee on June 29, 1959 and before a grand jury in October 1959 (See G.A. 74–82, 92–103); Hoffa's statement under oath on September 17, 1958 (G.A. 83–91); an F.B.I. interview with Burris on February 17, 1960 (G. Ex. 17A I H.D.A. 310–315) and on October 2, 1962 (G. Ex. 19A, I H.D.A. 321–324).

(2) Sigelbaum's interest in Sun Valley

In an interview with the F.B.I. on November 8, 1960 Sigelbaum described in some detail his membership in a group which, after conferences with Dranow, had invested $250,000 for a 50% interest in Sun Valley stock and stated that his own investment amounted to over $66,000 (G. Ex. 4A, I H.D.A. 257–262; III H.D.A. 1228–1229). Similar information was contained in the statement of Edwin Willis (one of Sigelbaum's associates in the Sun Valley venture) to the F.B.I. on December 22, 1960 (G. Ex. 9A, I H.D.A. 279–282, III H.D.A. 1229).[14] Also introduced at the hearing was the November 15, 1960 statement of Julius Friedman, the attorney representing the Sigelbaum interests in this venture, which referred to that group's further investment in Sun Valley (G. Ex. 5A, I H.D.A. 262–270, 267).

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[14] Willis' statement of December 22, 1960 (G. Ex. 9A, I H.D.A. 279–282, 280) further directly provided the information contained in the log that Willis was to be the "trustee".

(3) A bank's claim against the Dranow-Burris interest in Sun Valley

Information relating to this matter was contained in detailed testimony before a federal grand jury on October 9, 1962 from Lou Poller, an officer of the Miami National Bank, which had numerous dealings with the Teamster Pension Fund. According to Poller's testimony, Dranow had an account at the Miami bank which became overdrawn by more than $50,000 and Poller covered this from his own account. Poller thereafter threatened to overturn the sale of Sun Valley stock unless he or the bank received 10% from the Dranow-Burris interests in that stock (See G. Ex. 25A, I H.D.A. 437–440; III H.D.A. 1229–1232). See also, Poller's F.B.I. interview of July 25, 1962 (G. Ex. 14A, I H.D.A. 299–300).

(4) The $57,000 transaction between Burris and Kipnis

The government's information relating to this transaction[11] came from several sources pre-dating the Burris-Sigelbaum conversation of December 1963. This transaction was referred to by Kipnis in F.B.I. interviews on July 2, 1962, July 31, 1962 and October 31, 1963 (G. Exs. 6A–8A, I H.D.A. 270–279; III

[11] The trial evidence revealed that, in 1960, Irving Kipnis had agreed to pay Burris a fee to obtain a Pension Fund loan to build the Causeway Inn. At about the same time, Kipnis gave Burris $57,000 for an option to buy 10% of Sun Valley with the further agreement that the option would become a loan if Kipnis decided not to exercise it. The option ultimately became a loan to Burris which was used to rehabilitate Sun Valley. Burris repaid it in 1962 out of fees he had received in procuring the Causeway Inn loan for Kipnis (II D.A. 1386, 1389–1391).

H.D.A. 1004–1007). In addition, Kipnis discussed this transaction in an affidavit given to the Internal Revenue Service on May 31, 1963 (G. Ex. 11, I H.D.A. 284–290; see III H.D.A. 1103–1105), and in an interview with the F.B.I. and I.R.S. on August 6, 1962 (G. Ex. 12A, I H.D.A. 290–294, 291).[16]

(5) Sigelbaum's use of the term "bail-out"

The government showed that the use of the phrase "bail-out" to describe the attempt to take Sun Valley out of reorganization long preceded the Burris-Sigelbaum conversation of December 1963. At trial, Carl Langford, the trustee of SunValley during reorganization, had testified that in 1960 defendant Hyman had asked him what it would take to "bail the corporation out of its difficulties" (II D.A. 1399–1400).

(6) Burris received a fee from the airport

This apparently refers to transactions involving the procurement of loans to construct a hotel at the Miami Airport. Between 1959 and 1961 George Simon, a Miami accountant, secured Teamster Pension Fund loans for such construction with the assistance of Burris. Simon paid Burris a finder's "fee" for his services in procuring the loans (II D.A. 1174, 1179–1185). Detailed information relating to this transaction came from Simon's statements to the F.B.I. on February 2, 1961, and February 14, 1961 (G. Exs. 15A–16A, I H.D.A. 301–310); see also, the February 15, 1961, statement of one Jack B. Cooper, a stockholder in

[16] Kipnis also recounted the details of this transaction in testimony before a federal grand jury sitting in Chicago, on September 18, 1962 (G. Ex. 22A, see I H.D.A. 373).

Airway Hotel Inc., stating his awareness that "finders's fees" had been paid to Burris (G. Ex. 10A, I H.D.A. 283–284).

(7) The procedures of the Pension Fund

The safeguarding procedures said to have been employed by the Teamster Pension Fund in processing loan applications were described before a federal grand jury on February 8, 1962, by Morris Lieberman, Appraiser for the Pension Fund (G. Ex. 20A, I H.D.A. 324–349), and on October 17, 1962, by Stanford Clinton, General Counsel for the Pension Fund (G. Ex. 26A, I H.D.A. 441–448).

(8) Hyman's expenditures of Key West Foundation loan proceeds

As developed at the trial, defendant Hyman had obtained Pension Fund proceeds in 1959 and 1960 for Key West Foundation for the avowed purpose of building a shopping center and for remodeling an apartment development and had used such proceeds during the period in question for purposes other than those represented to the Pension Fund (See Br. 19–22). At interviews with F.B.I. agent Godwin on June 20 and July 7, 1961, Hyman advised that he had used $100,000 of Pension Fund proceeds loaned to Key West Foundation to purchase a one-half interest in Sun Valley (II D.A. 900, see also II D.A. 892–897). There was also the testimony of Cecil Black (who did carpentry and masonry work for Hyman) who testified before a grand jury on August 27, 1962 (G. Ex. 27A, I H.D.A. 449–460) and at trial (II D.A. 919–930, erroneously titled in the Appendix, *"Testimony of Burton Harrison"*) that he had signed waivers

for receipt of loan funds for construction payments from Hyman (some $656,000), when, in fact, he had not actually been paid such funds (see G.A. 138–145). There was also testimony at trial that payment had not been made to another creditor, contrary to what Hyman had represented to the Fund (see II D.A. 908, 935–936, 938–939). This testimony and supporting documentary evidence thus showed that from May to November 1960 Hyman obtained the full amount of the second Pension Fund loan ($400,000) by misrepresenting to the Fund that construction expenses amounting to $706,000 had in fact been incurred (see G.A. 134–145, 323–324, 344–345).

At the hearing, agent Connors testified that he had examined the books of Key West Foundation in 1962 and at the end of September 1963, at the request of government counsel then involved in preparation for the trial, and had used these records to prepare schedules relating to the disposition of Pension Fund loans by Key West Foundation (III H.D.A. 1007–1008, 1081).[17] Based upon his examination of the books of Key West, ledger sheets, checks and other exhibits in evidence (III D.A. 1681–1682), he had testified at trial that during this period of allegedly heavy construction expenses by Key West Foundation (November 1959 through December 1960), with Hyman making periodic "construction draws" on the Pension Fund loans assertedly to pay creditors (see, *e.g.*, G.A. 138-142), no payment to creditors in the amount al-

[17] Government Exhibits 21A and 24A reveal that the books and records of Key West Foundation had been turned over to the government in September and October 1962 (I H.D.A. 350–352, 432–436).

leged appeared in the books and records of Key West Foundation (III D.A. 1683, 1686, 1687, 1693, 1701, 1709, 1740; see II H.D.A. 585–586).

Agent Connors testified that certain of his accounting schedules (those dealing with Key West Foundation books for the latter part of 1962) were prepared in 1964 (III H.D.A. 1027, 1038). This was after he had seen the log of the Burris-Sigelbaum conversation of December 2, 1963 and had prepared the two memoranda of that log (III H.D.A. 1027). He also testified that the accounting "summaries" he had actually used at trial were prepared a few weeks before his trial testimony at the direction of the government prosecutors, and were basically "a recap of the older summaries" (III H.D.A. 1028–1030, 1011).[18] He stated that the December 1963 conversation "meant nothing to" him and he "did not consider that conversation" in preparing his accounting documents (III H.D.A. 1027–1028); that the Key West books and records showed that by the end of December 1960, all Pension Fund loans received up to that time had been spent (III H.D.A. 1041); that when he prepared his accounting summaries, he did not know that it would be

[18] During cross-examination at trial, Connors had testified that some of the accounting worksheets he had earlier prepared were destroyed—some at the end of 1962 and others about seven weeks before trial—because he had been advised by the government prosecutors that they were not to be used. He further stated that "some" of these destroyed worksheets dealt with a period beyond December 31, 1960—*i.e.*, the cut-off date of the summaries used at trial (See III D.A. 1726–1728; II H.D.A. 593–594, 597). He further explained that his trial summary "of the whole picture" superseded these earlier worksheets (III D.A. 1727, 1731–1732).

the defense's contention at trial that Hyman had ultimately spent all the Key West Pension Fund loan proceeds in a proper fashion (III H.D.A. 1078–1079); and that he never directed that the memoranda he prepared from the log be sent to government trial counsel, nor discussed the log of the Burris-Sigelbaum conversation or either of the two memoranda based thereon with any government trial counsel (III H.D.A. 1030, 1033, 1034–1035, 1057, 1086–1087).

(9) Reference to potential witness Bill Manheight

William Ryan, one of the Department of Justice attorneys involved in the prosecution of this case, testified that he had never heard of nor interviewed any "Bill Manheight" and that "Manheight" was not called as a witness to testify at trial (III H.D.A. 1120). Agent Connors testified that he had never heard of "Manheight" nor seen any report concerning an investigation of "Manheight" (III H.D.A. 1052).[19]

C. THE FINDINGS OF THE COURTS BELOW

1. After summarizing the evidence adduced at the hearing, including that presented by the defense (see Pet. No. 895 App. 78–89), the district court concluded "that the government obtained no new information from the electronically eavesdropped overhearings in

[19] "Philip Monheit" testified as a defense witness at the hearing that he had in the past applied for a Teamster Pension Fund loan, but had never gone through "with the deal" and that in February 1963 he had been interviewed by an F.B.I. agent (I H.D.A. 224–226; III H.D.A. 1330–1335). Monheit never testified at trial nor was his name mentioned in connection with any evidence adduced at trial (H. Tr. 1723).

the record and that none of the overhearings had any relevance to the convictions of any of the defendants." Accordingly, it found "that the convictions of none of the defendants were tainted by the use of evidence improperly obtained" (*United States* v. *Hoffa*, 273 F. Supp. 141, 147 (N.D. Ill); Pet. No. 895 App. 89–90). With particular reference to the nine overhearings submitted for *in camera* inspection (G. Ex. 1A), the district court stated that it had carefully read the "extremely brief overhearings" and that they "contain no information either remotely or peripherally relevant to the transactions and evidence on which these defendants were indicted and convicted" (273 F. Supp. 141, 143; Pet. No. 895 App. 79–80). The district court thereupon denied the motions for a new trial, entered new final judgments of conviction against each of the defendants and reimposed the sentences originally imposed (I H.D.A. 155–164).[20]

2. The court of appeals affirmed, Judge Swygert dissenting. The majority agreed with the district court that none of the convictions was based on tainted evidence; that the nine overhearings of defendants which had been submitted for *in camera* inspection to the district court were not "remotely" relevant; and that the other questions raised on appeal were without substance (Pet. No. 895 App. 91–104). In response to inquiry during oral argument of the appeal government counsel disclosed to the court of appeals that certain lawyers of record for the defendants in the original

[20] Except as to defendant Hyman who had died sometime prior to the hearing (See I H.D.A. 176–177).

Pension Fund trial had been electronically overheard talking to persons other than defendants about matters not related to this case and submitted the logs of these overhearings to the court for *in camera* inspection. Based upon its *in camera* examination of these logs the court concluded that "the information is completely irrelevant to the Hoffa case before this Court" (Pet. No. 895 App. 98).[21]

ARGUMENT

Petitioners' contentions fall into two broad categories: It is first urged that this Court should grant plenary review to remedy alleged errors resulting from the eavesdrop hearing held pursuant to this Court's order of remand (Pet. No. 895, pp. 55–77; Pet. No. 911). It is next asserted that errors flowing from the original conviction in 1964 justify issuance of the writ (Pet. No. 895, pp. 76–106). Since the alleged errors flowing from the conviction were raised in the original petition (No. 1003, O.T. 1966) and are fully answered in our original brief in opposition, we do not repeat those responses here but rely upon that brief.[22] However, since one of the earlier contentions has been recast to rely on *Bruton* v. *United States*, 391 U.S. 123, we shall answer that contention in this brief.

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[21] Both the sealed defendant overhearings and the overhearings of attorneys are on file with the Clerk of this Court.

[22] We are filing herewith 10 additional copies of our original brief in opposition which we have asked the Clerk to distribute to the Court.

I

ISSUES ARISING FROM THE EAVESDROP HEARING

A. THE BURRIS-SIGELBAUM OVERHEARING

The facts detailed in the Statement show that the government's evidence at trial stemmed from sources wholly independent of the Burris-Sigelbaum conversation and that the conversation did not provide investigative leads and was not used in any fashion at trial.[23] The government's case was predicated upon years of extensive, independent investigation predating the unplanned overhearing of Burris on December

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[23] For the first time in this Court petitioners urge (Pet. No. 895, pp. 66–67) that the "beyond a reasonable doubt" standard of *Chapman* v. *California*, 386 U.S. 18, should be applied to determine whether the government has established lack of taint in the Burris-Sigelbaum conversation. This standard was not, however, urged in the district court or in the court of appeals. There the government agreed with the view expressed by petitioners in their brief that the "clear and convincing evidence" test announced in *United States* v. *Wade*, 388 U.S. 218, 240, was the appropriate standard (see petitioners' brief in the court of appeals, p. 57; cf. the government's brief in the court of appeals, p. 38). Petitioners have not shown any "exceptional circumstances" which would allow them to make this contention for the first time in this Court. See *Lawn* v. *United States*, 355 U.S. 339, 362–363, n. 16. Nor do the court of appeals cases which petitioners cite (Pet. 67) point to the adoption of the *Chapman* standard in the present context. They hold only that if illegally seized evidence is introduced at trial, the government must meet the *Chapman* test in order to show lack of prejudicial error.

In any event, our position is that whatever standard is applied, the government met its burden of establishing lack of taint arising out of the Burris-Sigelbaum conversation.

2, 1963.[24] Indeed, the detailed indictment in this case—which was returned some six months before the Burris-Sigelbaum conversation took place—dealt with all the loan transactions proved at trial (1 D.A. 41-77). As the majority below noted, "[i]t is apparent the charges made against the defendants in the indictment were drawn in such detail and particularity that they could have come only from a full investigation of all the facts underlying the scheme. It is neither conceivable nor realistic to believe that this information could have been obtained from a cryptic half hour conversation which occurred six months after the indictment had been returned" (Pet. No. 895, App. F 97).[25]

1. *a.* Petitioners contend that the government obtained a theory of the defense because of overhearing Sigelbaum comment to Burris that "Bill Manheight" would make a good defense witness to show how difficult it was to get a Pension Fund loan (Pet. No. 895, p. 57). The government, however, did not know who this "potential" witness was until it learned at the eavesdrop hearing that "Bill Manheight" was actually "Philly Monheit" one of the numerous loan

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[24] As the evidence adduced at the hearing made quite plain, the overhearing occurred as a result of the government's surveillance of Benjamin Sigelbaum and "his connection with organized crime" and was not the result of any investigation conducted as to any defendant (See III H.D.A. 1253, 1337, 1349, 1352).

[25] The trial lasted about 13 weeks and involved the testimony of approximately 140 witnesses and the introduction of several thousand exhibits. The trial transcript exceeds 16,500 pages.

applicants who had been interviewed by the government before trial but whose testimony was never adduced at trial (III H.D.A. 1119–1120, 1052, 1330–1333). Moreover, the government was fully aware of the Pension Fund's loan screening procedures from wholly independent sources (see *supra*, p. 19; G. Ex. 20A, I H.D.A. 325, 330–349; G. Ex. 26A, I H.D.A. 441, 443–448). Nor does the fact that one of the government trial counsel wrote "such testimony would not be admissible" next to the January 1964 memorandum's reference to "Manheight" (see G. Ex. 2–3, I H.D.A. 126, 252) support the argument that this individual or his information was ever used by government counsel; the notation reflects only government counsel's normal reaction to information which he believed was clearly not relevant to the case.

b. Petitioners' major argument on this aspect of the case (Pet. No. 895, pp. 57–59) stems from the fact that F.B.I. agent Connors, who had prepared the January 1964 memorandum which had been circulated to the government prosecutors, was also a government witness at trial testifying as an accounting expert concerning the expenditures of Hyman's Key West Foundation. Relying on the fact that Connors reported in the memorandum that Burris told Sigelbaum that, while Hyman had used Pension Fund Proceeds "a little differently" at first, he had "ultimately put it into the property" (See I H.D.A. 252), and that government counsel had written the notation "does this check out" on this portion of the memorandum (see I H.D.A. 126), petitioners argue

that Connors, at the behest of the prosecutors, must have tailored his testimony at trial to avoid mentioning Key West's expenditures in 1961, in an effort to anticipate and thwart the defense theory (allegedly learned from the memorandum) that in this later period Hyman had properly expended the Pension Fund loan proceeds.

The Key West Foundation loans from the Pension Fund were obtained in the fall of 1959 and the spring of 1960 (Br. 19–22). It was a condition of the $400,000 loan in 1960 that Hyman would have to expend one dollar for every two dollars loaned by the Fund and that detailed, written proof of expenditures had to be submitted to secure construction "draws." The evidence showed that Hyman withdrew the full $400,000 in 1960 on the basis of documents purporting to show the expenditure of $706,000. The government showed that this documentation was false. In particular it showed, payments of $656,000 allegedly made to Black Construction Company, were not made and that Black was a salaried employee of Hyman who never received more than $125.00 per week for himself. In addition Connors testified that the books of Key West showed expenditures of $186,000, not $706,000, during 1960.

Since the money was paid out by the Fund for money allegedly spent by Hyman in 1960, the government properly proved its case by showing that the alleged expenditures had not in fact been made in 1960. The claim that Hyman did actually spend the money

on remodeling in 1961 [26] was at best a defense in mitigation not going to prove the absence of falsity in the earlier representations made to the Pension Fund. There is thus no reason to read sinister implications into the fact that government counsel told Connors that it was confining his accounting evidence to 1960.[27] Connors testified at the hearing that at the time he prepared his accounting summaries he did not know "it was Hyman's position that he had spent all of the money from the loan on his property" (III H.D.A. 1040), nor did he learn of that fact from any of the defendants "directly or indirectly" (III H.D.A. 1078–1079). He further testified that he had not discussed the log or the memorandum he prepared therefrom with the government prosecutors (see III H.D.A. 1030, 1033, 1034–1035, 1054–1057, 1086–1087) and unequivocally stated that the December 1963 Burris-Sigelbaum conversation "meant nothing to" him in preparing his accounting documents (III H.D.A. 1027–1028).

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[26] Richard Furman, an accountant whose firm audited the books of Key West Foundation, testified, as a defense witness, that Key West's book showed expenditures for construction and improvement in 1961 but his testimony did not show that these expenditures were the ones that Hyman had represented to the Pension Fund were made in 1960 (III D.A. 1776–1781).

[27] Connors testified in cross-examination at trial that he had limited his accounting summary to December 31, 1960 because of a decision by government counsel to that effect shortly before trial and that he had destroyed his earlier prepared accounting papers—some of which related to the post 1960 period—because he had been told by government prosecutors that they were not going to be used (see III D.A. 1701, 1727, 1731–1732).

2. As a variant of the foregoing argument, petitioners urge that the failure of the government to produce for inspection at trial the two memoranda of the log prepared by agent Connors or a memorandum he had prepared in October 1963, violated their rights under 18 U.S.C. 3500 (Pet. No. 895, pp. 59–63).

a. The memoranda which Connors prepared from the log of the Burris-Sigelbaum conversation did not relate to the direct testimony of Connors at trial. The agent testified at trial solely as an expert accountant with regard to the books and records of Key West Foundation. Indeed, one of defense counsel at trial objected to Connors' testimony on the ground that the records of Key West Foundation spoke for themselves (III D.A. 1689). In short, Connors' sole function and the entire tenor of his testimony was to provide the jury with an expert's analysis of these documents. Cf. *United States* v. *Donlon,* 256 F. Supp. 336, 341–342 (D. Del.), affirmed, 370 F. 2d 987 (C.A. 3), vacated and remanded for other reasons (No. 121, O.T. 1967), in *Stone* v. *United States,* 390 U.S. 204. The basic purpose of 18 U.S.C. 3500 is to provide for production of documents which have some conceivable relevance to the witness' cross-examination. See, *e.g., Palermo* v. *United States,* 360 U.S. 343, 349–351; *Rosenberg* v. *United States,* 360 U.S. 367, 370; *Ogden* v. *United States,* 303 F. 2d 724, 740 (C.A. 9); *Oertle* v. *United States,* 370 F. 2d 719, 724–725 (C.A. 10), certiorari denied, 387 U.S. 943; *United States* v. *Heap,* 345 F. 2d 170, 171 (C.A. 2).

Here the memoranda did not bear any relevance to Connors' testimony.[28]

In any event, the superficial hearsay comment by Burris added nothing to what the defense already knew of Hyman's expenditures for Key West Foundation. The defense introduced its own expert analysis concerning the 1961 expenditures during their direct case at trial (see III D.A. 1774–1783). Although the factual setting may be different, the reasoning of *Rosenberg* v. *United States,* 360 U.S. 367, 371 applies here: "Since the same information that would have been afforded had the document been given to defendant was already in the possession of the defense * * * it would deny reason to entertain the belief that defendant could have been prejudiced by not having had opportunity to inspect the [document]." See, similarly, *Killian* v. *United States,* 368 U.S. 231, 243–244.[29]

b. Petitioners also claim that the government improperly failed to produce at trial a memorandum prepared by Connors on October 8, 1963 relating to

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[28] When, at trial, Connors testified on cross-examination that he rendered no report concerning his work, the inquiry and his answer were obviously directed to accounting work concerning the matters about which he had testified (III D.A. 1726–1727, see also III H.D.A. 1062).

[29] We see no valid basis for distinguishing *Rosenberg* or *Killian* because the information in those cases came into the possession of the defense in a way different from this case—*i.e.*, in *Rosenberg* by way of the witness' testimony at trial and in *Killian*, by way of other statements turned over to the defense. Whatever the source, the defense had full and independent access to information which it is said was denied it by the government.

conversations with government trial counsel concerning his preparation of accounting summaries (See D. Ex. H–7, I H.D.A. 221–224). It is not clear, however, that this document was a "statement" within the purview of 18 U.S.C. 3500. It contained neither recommendations nor conclusions, but was simply a general outline concerning the format that Connors proposed to follow in preparing his accounting papers (See I H.D.A. 221–224). When, at the hearing, defense counsel asked Connors why he had said at trial that he had made no report of his accounting work when in fact he had prepared this report of October 8, 1963, government counsel pointed out that this document was not a report of his accounting work but rather "a report on a conversation in which work was asked to be performed" (III H.D.A. 1062).

But even if this October 1963 memorandum was a "statement" of the witness relating to his direct testimony at trial within the reach of 18 U.S.C. 3500, it had marginal—if any—impeaching value. The document's single reference to 1961 was contained in the heading of an "example" of the type of accounting schedules the agent was preparing, with no reference to any money spent by Hyman during that period of time (I H.D.A. 221–222). Moreover, as we have already stressed, the manner in which Hyman spent funds in 1961 was immaterial to the government's case. By independent evidence the government had established that Hyman had in 1960 misrepresented the extent of construction expenditures to the Pension Fund. Agent Connors simply corroborated this evidence by testifying that Key West's books and records for 1960 showed that no such

expenses had, in fact, been incurred (See Br. 17–22).[30]

c. The foregoing discussion fully disposes of petitioner's related claim (Pet. No. 895, pp. 63–65) that the principles of *Brady* v. *Maryland*, 373 U.S. 83, require reversal for failure to disclose these documents at trial. In view of their extremely limited value the failure to disclose these documents for impeachment purposes hardly can be categorized as a due process violation.

B. OTHER ISSUES ARISING FROM THE EAVESDROP HEARING

1. Petitioners assert that the introduction by the government of the affidavits of Charles Bolz, Section Chief of the Accounting and Fraud Section of the Federal Bureau of Investigation and of Leon Green, Deputy Assistant Commissioner of the Internal Revenue Service, to carry its burden of showing that neither the F.B.I. nor the Internal Revenue Service had any overhearings of defendants except those turned over to the defense or the district court for *in camera* inspection [31] denied them the right of confrontation guaranteed by the Sixth Amendment (Pet. No. 895, pp. 72–75). Rule 27 of the Federal Rules of Criminal Procedure, and Rule 44 of the Federal Rules of Civil Procedure, how-

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[30] It should also be noted that the Key West Foundation transaction itself was only a one of nine multi-faceted Pension Fund transactions proved at the trial establishing a far-flung scheme to defraud the Pension Fund.

[31] These affidavits, in essence, stated that both the F.B.I. and the Internal Revenue Service had caused searches to be made of their files to determine if there were any other overhearings of the defendants not turned over to the defense or to the court and that the searches revealed no such additional overhearings (See I H.D.A. 118–119, II H.D.A. 851–852, 854–855).

ever, embody the reasonable principle that there is no occasion to burden government officials with the duty of personal appearance with respect to official records. Lack of a record may be proved by a certified statement of an official that, after diligent search, no such records exist. The sworn affidavits of Bolz and Green satisfied these requirements. See *T'Kach* v. *United States,* 242 F. 2d 937, 938 (C.A. 5); *United States* v. *Ansani,* 138 F. Supp. 454, 461 (N.D. Ill.), affirmed, 240 F. 2d 216 (C.A. 7), certiorari denied *sub nom. Milner* v. *United States,* 353 U.S. 936; *Smith* v. *United States,* 353 F. 2d 838, 844 (C.A.D.C.), certiorari denied *sub nom. Cunningham* v. *United States,* 384 U.S. 910.[32]

In recognition of these controlling precedents, petitioners argue that there is "an apparent" conflict between Rule 27 of the Federal Rules of Criminal Procedure, and the Sixth Amendment (Pet. No. 895, p. 75). The decisions relied upon for this argument, however, are inapposite (Pet. No. 895, pp. 74–75). They basically deal with the denial, of the right to be confronted with and cross-examine the witnesses whose evidence is sought to be introduced on the issue of guilt or innocence at a criminal trial. They have no bearing on the present situation—an eavsedrop hearing at which the officials in a position to know have submitted affidavits confirming the repeated representations of government counsel (see II H.D.A. 845–849, 853, III H.D.A. 1524) that the only records of overhearings of defendants in the government's possession are those which have been turned

[32] Compare *Lawn* v. *United States,* 355 U.S. 339, 348–349, where this Court deemed affidavits submitted by government agents and prosecutors sufficient without a hearing to overcome an allegation of taint.

over to the defense or to the trial court. Indeed, petitioner's argument is particularly weak since the district court stated that the defense could call Bolz and Green as witnesses (II H.D.A. 860–861), and the defense chose not to avail itself of that opportunity. Cf. *Baker* v. *United States,* 401 F. 2d 958, 980 n. 92 (C.A.D.C.).

2. At the express direction of the district court at the eavesdrop hearing the government submitted to that court for *in camera* inspection nine logs of overhearings which government counsel described as "isolated accidental and absolutely irrelevant overhearings of some of these defendants" (see II H.D.A. 849, 852–853; III H.D.A. 1524–1525). After inspecting the logs the district court found that they were "not remotely relevant" to the issues involved in the case (II H.D.A. 864–865). Based on its own independent examination, the majority below agreed without qualification and, relying upon its holding in *United States* v. *Battaglia,* 394 F. 2d 327, pending on petition for a writ of certiorari, No. 168, O.T., 1968, found no error in this procedure (Pet. No. 895 App. 96).

We recognize that the issue whether the results of eavesdropping may first be examined by a judge who in his discretion may then decide that they are unrelated to the case and thus should not be turned over to the defense, is presently before this Court on reargument in *Alderman* v. *United States* (on Motion to Amend the Court's Order of January 29, 1968, No. 133, O.T. 1967) and that the Court may wish to defer consideration of this question pending its decision in *Alderman.* We point out, however, that the few logs of

defendant overhearings involved in this case were found "not remotely relevant" by both courts below, and precisely fit within the classification of logs described in our *Alderman* brief as "so clearly unrelated to the case at issue that the court may easily determine that further disclosure is not necessary" (See Brief for the United States in *Alderman, id.* at 16). These logs are presently on file with the Clerk and available for the Court's inspection.

3. Petitioners broadly argue that they were deprived of their constitutional rights because the district court did not require the government to disclose to the district court or to the defense any overhearings of defense counsel (Pet. No. 895, pp. 69–72).

a. The claim that the position taken by the district court on the attorney overhearings was contrary to this Court's order of remand rests upon the assumption that by its short *per curiam* order this Court *sub silentio* meant to overturn the settled rule that only one whose "right to privacy of person or premises" has been invaded may challenge illegal government action (*e.g., Wong Sun* v. *United States,* 371 U.S. 471, 491–492; *Jones* v. *United States,* 362 U.S. 257, 261; *Goldstein* v. *United States,* 316 U.S. 114; cf. *Baker* v. *United States,* 401 F. 2d 958 (C.A.D.C.)),[33] as well as this Court's earlier admonition in *Nardone* v. *United States,* 308 U.S. 338, 341–342, that the scope

[33] Nothing said in *Mancusi* v. *DeForte*, 392 U.S. 364, or *Simmons* v. *United States*, 390 U.S. 377, did away with the established requirement that, to raise a Fourth Amendment claim, a defendant must show a right to privacy in the area subjected to the governmental intrusion. See, *e.g.*, *DeForte*, *supra*, 392 U.S. at 367–369.

of "such auxiliary inquiries" are within the sound discretion of the trial judge and may be "closely confined" so long as the issue of taint is fully explored. Cf. *Lawn* v. *United States*, 355 U.S. 339, 348–349.

Here, the district court required the government to produce all overhearings of defendants, whether relevant or not. On their side, the defense was allowed to "produce whatever evidence you can find in regard to electronic eavesdropping and the other defendants in this case, or the lawyers in this case, in which this trial was discussed or preparations for this trial was discussed" (II H.D.A. 805–806; see also II H.D.A. 857–858). That the defendants were not able to make any such showing[34] hardly establishes any improper limitation by the district court at the eavesdrop hearing.

b. Undeniably, the government had a duty to turn over to the defense or the district court all records in its possession in which a defendant was overheard talking to his lawyer. As *Black* v. *United States*, 385 U.S. 26; *O'Brien* v. *United States*, 386 U.S. 345, and *Granello* v. *United States*, 386 U.S. 1019, illustrate, the government is committed to the disclosure of any interception of a communication between a defendant and his attorney in a pending case, irrespective of whether that conversation is relevant to the issues in

[34] In accord with the guidelines set by the district court, the defense introduced a substantial amount of evidence in support of its claim of undisclosed governmental overhearing (see the details of this evidence set out in the opinion of the district court, 273 F. Supp. at 144–147; Pet. No. 895 App. 82–89). None of this evidence established the existence of any producible overhearings.

the case. We further recognize an obligation to disclose in a situation where defense counsel was overheard talking to a third party about a particular defendant's case in such a way that improper overhearing by the government could be said to have interfered with the defendant's right to counsel. The failure to make any such disclosure in this case simply stemmed from the fact that the government overheard no conversations involving counsel of record relating in any way to this case, much less one which could be characterized as relating to matters within the councils of the defense.

We stress, however, that to recognize an obligation to produce in the foregoing situations is far different from saying that a defendant, either under his own right of privacy or under his right to counsel, is entitled to production of conversations between third parties simply because one of these parties is an attorney or an alleged investigator (See Pet. No. 895 71–72) for a defendant in a criminal case. An attorney, as anyone else, engages in many different conversations with many different individuals both in his professional capacity and otherwise; obviously what he says about client B's case may not have the remotest bearing on the case of client A. The fact that the government has been guilty of illegal surveillance does not justify allowing client A to review the records of the overhearing of the conversation between the attorney and B which has no relation to A's case.

c. The logs of the overhearings of counsel of record were turned over to the court below for *in camera*

examination, not because the government believed that they had any relation to this case but because, during oral argument, the court of appeals evinced concern as to the nature and extent of such overhearings, apparently prompted by petitioner's broad claims to that effect. Our purpose was simply to remove any concern the court might have by showing that no overhearings of record counsel in our possession had even the remotest bearing on this case. The court of appeals agreed, observing that its examination of the logs revealed that the information therein "is completely irrelevant to the Hoffa case before this Court" (Pet. No. 895 App. 98).[35]

3. Petitioner Dranow separately urges that the district court's finding that he was mentally competent to participate in the hearing was erroneous.[36] The record, however, shows that Dranow was sufficiently competent to meet the standard of trial competency

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[35] There were five such overhearings of counsel of record all occurring either long before or long after the trial in this case. They were with other clients or third parties having nothing to do with any defendant in this case. The logs of these overhearings are presently on file with the Clerk of this Court.

No logs of any conversation between alleged investigator O'Brien and his counsel were disclosed to the court of appeals because the government had overheard no conversation involving O'Brien and any counsel of record in this case. Moreover, as we pointed out in our brief in opposition in *O'Brien* v. *United States*, No. 823, O.T. 1966, p. 11, in the overheard conversation between O'Brien and his counsel only O'Brien was heard to speak and then only relating to bail in a case pending against him.

[36] Petitioner Dranow's further argument that he was incompetent at the time of trial is fully answered in our original brief in opposition in the 1966 Term (Br. in Opp. in No. 1003, O.T., 1966, pp. 57-61).

adopted by this Court in *Dusky* v. *United States*, 362 U.S. 402, that the accused have a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and have "a rational as well as factual understanding of the proceedings against him." It should, moreover, be noted that participation by the defendant is of much less significance at this type of hearing than would be the situation at trial. As the trial court pointed out (II H.D.A. 830):

> This is not a trial of a criminal case where it is necessary for this defendant to communicate his defenses to his counsel. This is in the nature of a motion for a new trial. There is no evidence that Mr. Dranow has any information to communicate to his lawyers that could conceivably be admissible within the confines of this limited hearing.[37]

At the competency hearing (held shortly before the eavesdropping hearing), three psychiatrists—Drs. Adams, Burris and Seglin—testified for the defense. Based on their examination of Dranow on July 24, 1967 (II H.D.A. 762, 775, 778) and their examination of the reports of psychiatrists at the Federal Medical Center at Springfield, where Dranow had been in custody since October 1966 (I H.D.A. 186), each of these doctors stated his belief that Dranow was so severely depressed as to render him incapable of assisting counsel and understanding the contemplated eavesdrop hearing (II H.D.A. 763–765, 775–776,

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[37] It was admitted by defense counsel that Dranow was incarcerated during the entire period—*i.e.*, January 1963 to July 1965—of the trespassory eavesdropping of Sigelbaum's office (II H.D.A. 831–832).

779). In addition, the defense submitted various psychiatric records relating to Dranow's incarceration in Springfield, including diagnoses to the effect that Dranow suffered from a "borderline schizophrenic reaction, paranoid type, of a chronic nature, of mild to moderate severity" (see, *e.g.*, I H.D.A. 196, 191). While several of the Springfield reports indicated that Dranow was a "paranoid schizophrenic," a progress report of July 14, 1967—shortly before the eavesdrop hearing—stated that he had improved and was "mentally and physically able" to make the trip to appear at the hearing (II H.D.A. 749–750).

The government adduced the testimony of Dr. Benjamin Kesert, a psychiatrist, who had examined Dranow on July 23, 1967 (II H.D.A. 659). He was of the opinion that Dranow was mentally competent, understood the charges against him and was able to cooperate with counsel (II H.D.A. 661–664, 665–666, 671). Doctor Kesert further testified that none of the medical reports prepared by psychiatrists at Springfield changed his views as to Dranow's mental competency (see II H.D.A. 681–682, 685–686, 689–690, 694–695, 699–700, 709–710). The trial court found Dranow competent to participate in the hearing (II H.D.A. 830).

The evaluation of the expert testimony was for the trial judge.[38] There is no reason for this Court to overrule his determination. *E.g., United States* v.

[38] While petitioner Dranow now attempts to cast some doubt on Dr. Kesert's qualifications (see Pet. No. 911, pp. 9, 11), at the hearing no defense counsel found it necessary to cross-examine Kesert concerning his qualifications as brought out in his direct examination (see II H.D.A. 656–658).

Armone, 363 F. 2d 385, 403 (C.A. 2), certiorari denied, 385 U.S. 957; *Merrill* v. *United States*, 338 F. 2d 763, 765–766 (C.A. 5); *Feguer* v. *United States*, 302 F. 2d 214, 236 (C.A. 8), certiorari denied, 371 U.S. 872; cf. *Holt* v. *United States*, 329 F. 2d 368, 372 (C.A. 7), certiorari denied, 379 U.S. 862.

II

THE ORIGINAL ISSUES ON APPEAL

As noted, the issues relating to the original proceedings are fully dealt with in our original brief in opposition in this case, and we refer the Court to that brief for our detailed response (see Government's Brief in Opposition in No. 1003, O.T. 1966, pp. 33–63). We answer here only petitioners' claim concerning an alleged violation of the right to confrontation under *Bruton* v. *United States*, 391 U.S. 123 (see Pet. No. 895, pp. 84–87).

During the cross-examination of petitioner Dranow at trial, the government sought to impeach him by reference to certain letters he had written to one Irving Link indicating that various of the defendants had put money away for him on a daily basis in connection with certain properties which were involved in loan applications (see Br. 62–63). The jury was first admonished by the trial judge to consider this evidence only against Dranow (III D.A. 2018, 2021). After further reflection, however, the court decided to exclude this evidence as to these letters even as to Dranow, and so instructed the jury (III D.A. 2065–2066).

Bruton does not govern this case. In *Bruton* this Court held that the introduction at a joint trial of a confession of one codefendant which implicated another was constitutionally impermissible under the Confrontation Clause of the Sixth Amendment, and that an insulating instruction limiting consideration of the confession to the declarant did not remove the constitutional violation. In short, this Court concluded that it was unrealistic to assume that a jury could find a confession trustworthy and believable as to the declarant, and yet disregard it as to a co-defendant specifically implicated therein. In this case the jury was not called upon to perform such "mental gymnastics" since they were instructed not to consider the evidence of the letters against *any* of the defendants. See *United States* v. *Muller*, C.A. 3, No. 17075, decided on October 10, 1968, petition for a writ of certiorari pending, No. 1244 Misc., this Term. Moreover, unlike the situation in *Bruton*, at the time the letters were referred to Dranow was a witness at trial and fully available to his codefendants for cross-examination."

" Petitioners' reliance upon *Bajcec* v. *United States*, 392 U.S. 297, is misplaced. In this pre-*Bruton* case involving a declarant in a joint trial who testified in his own defense, this Court did not reverse the codefendant's conviction because the declarant's implicating confession was introduced at trial; this Court merely remanded the case to the court of appeals for its consideration in light of *Bruton*. In the instant case the court of appeals has already considered the implications of *Bruton* and decided that it does not control here (See Pet. No. 895 App. 101–103).

CONCLUSION

For the reasons stated herein and in our brief in opposition in No. 1003, O.T., 1968, the government is of the view that the petitions for writs of certiorari should be denied. We recognize, however, that the Court may wish to defer consideration of the petitions because one of the issues raised is presently pending in the the *Alderman* case.

Respectfully submitted,

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FEBRUARY 1969.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1003

JAMES R. HOFFA, BENJAMIN DRANOW, ZACHARY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT, CALVIN KOVENS, AND SAMUEL HYMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A 1–31, 32–67),[1] are reported at 367 F. 2d 698, 716.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1966 (Pet. App. B). A petition for re-

[1] For our record references we refer primarily to petitioners' three-volume appendix (herein "A.") and the government's one-volume appendix ("G.") in the court of appeals. We also occasionally refer to the multi-volumed trial transcript ("Tr."). All of these documents are part of the certified record on file with the Clerk of this Court.

hearing *en banc* was denied on November 28, 1966. On December 15, 1966, Mr. Justice Clark granted an extension of time until January 26, 1967, within which to file a petition for a writ of certiorari. The petition was filed on January 25, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence adduced by the government supported the finding of the jury that petitioners were members of a single conspiracy to defraud the Teamsters Pension Fund.

2. Whether the trial judge erred when, without advising the parties or their counsel, he instructed the bailiff to deliver the indictment to the jury at its request shortly after it had commenced its deliberations.

3. Whether the trial judge properly denied a motion for a new trial based on an alternate juror's post-verdict allegations of improprieties.

4. Whether the jury was adequately shielded from prejudicial newspaper publicity.

5. Whether it was reversible error for government counsel to ask petitioner Hoffa, on cross-examination, about a federal conviction then pending on appeal (and since affirmed).

6. Whether the trial court committed error in various procedural and evidentiary rulings during the trial.

7. Whether the trial court erred in failing *sua sponte* to order that petitioner Dranow be examined to determine his mental competency to stand trial.

8. Whether testimony relating to certain letters allegedly written by petitioner Dranow was prejudicial, even though the jury was subsequently told by the trial judge to disregard such testimony.

STATEMENT

Petitioners were convicted after a trial by jury in the United States District Court for the Northern District of Illinois on various counts of a 28-count indictment, returned on June 4, 1963, charging mail and wire fraud in violation of 18 U.S.C. 1341 and 1343, and conspiracy (count 28) to commit such offenses (I A. 41–77).[2] They were variously sentenced to fines and imprisonment (I A. 31–32, 296–305; III A. 2245–2257).[3] The sentence of each is fully supportable

[2] Herbert Burris was acquitted by the trial judge on all counts at the close of the government's case-in-chief. At the same time, on the government's motion, the court dismissed counts 10 and 18 and granted motions for judgments of acquittal on counts 2, 5, 11, 26 and 27 as to all the petitioners (III A. 1773).

[3] *S. George Burris*—$5,000 fine and eighteen months' imprisonment on count 28 with concurrent eighteen-month prison terms on each of counts 1, 6, 9, 21.

Benjamin Dranow—5 years' imprisonment on count 28, with concurrent 5-year prison terms on each of counts 1, 6, 9 and 21; this sentence to run consecutively to a sentence presently being served.

James R. Hoffa—$10,000 fine and five years' imprisonment on count 28, with concurrent 5-year prison terms on each of counts 1, 22 and 23; this sentence to run consecutively to the sentence imposed under a conviction in the United States District Court for the Eastern District of Tennessee.

Samuel Hyman—$5,000 fine and a year and a day imprisonment on count 28, with concurrent year-and-a-day prison sentences on each of counts 1, 12, 14, 19, 20, 24, and 25.

Calvin Kovens—$5,000 fine and three years' imprisonment on

on the conspiracy count. The court of appeals affirmed, one judge dissenting (387 F. 2d 698, 716; Pet. App. A).

I

THE SCHEME CHARGED IN THE INDICTMENT

The indictment alleged, in essence, that petitioners conspired to and did defraud the Teamster Pension Fund[4] by "submitting false and misleading statements of material fact and by concealing material facts in order to obtain loans from the Pension Fund; and diverting, through various fraudulent devices, substantial amounts of the loan proceeds for their personal use and benefit" (I A. 46).

Dranow and Burris (and sometimes Kovens) would contact potential applicants for Pension Fund loans and, for a fee, would undertake to act as their agents in the procurement of such loans, representing that they were able to obtain them because of their special relationship with petitioner Hoffa, the president of the International Brotherhood of Teamsters, president of Teamsters Local 299 of Detroit and a Trustee of the Pension Fund. Among the loan applicants were petitioners Kovens, Strate and Hyman (I A. 46–49). The various loan applications con-

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count 28, with concurrent 3-year terms on each of counts 1, 6, 7, 9, and 21.

Zachary Strate—$5,000 fine and three years' imprisonment on count 28 with concurrent 3-year terms on each of counts 1, 3, 4, 8, 13, 15, 16, and 17.

Abe I. Weinblatt—$5,000 fine and one hour in custody on count 28, with a concurrent one-hour term on count 1.

[4] Officially known as the Central States, Southeast and Southwest Areas Pension Fund.

tained material falsifications and concealed material facts (I A. 50–53). Hoffa actively utilized his status and position to influence approval of these fraudulent applications, making misrepresentations to, and concealing material facts from, the other trustees (sixteen in all) and staff members of the Fund (I A. 42, 49–50).

The indictment further alleged that petitioners caused in excess of $1,000,000 of fraudulently obtained loan proceeds to be diverted to their own personal use (I A. 53–54), and that more than $100,000 of diverted loan proceeds were applied to aid in the repayment of debts incurred by Sun Valley, Inc., a Florida real-estate corporation in which Hoffa had a substantial personal interest. Repayment of its debts enabled Sun Valley to extricate itself from reorganization proceedings and enabled Hoffa to withdraw $400,000 in Teamster funds deposited in a Florida bank in a "restricted" account as security for the bank's loans to Sun Valley which the bank had refused to release until Sun Valley repaid its loans (I A. 43–44, 54).

II

THE GOVERNMENT'S EVIDENCE

Since the principal basis of the dissent below is that the government's proof failed to establish a single conspiracy (see 367 F. 2d at 724–733; Pet. App. A 50–67)—a view urged by petitioners in this Court—we deem it appropriate to set forth the evidence in some detail.[5]

[5] The facts relating to petitioners' other allegations are set out in the pertinent portions of the Argument.

We start with a summary of the financial difficulties in which Sun Valley found itself in 1958, the impact that this had on petitioner Hoffa's Detroit local and the initial efforts by Hoffa, Dranow and Burris to rescue Sun Valley from its financial plight. We then describe the various Pension Fund loan transactions engaged in by petitioners, a description which will serve to illuminate the nature of the fradulent scheme triggered by the Sun Valley problem and the roles played by the various petitioners. Finally, we note how portions of the fraudulently obtained loan proceeds were utilized to help revitalize Sun Valley.

A. SUN VALLEY

1. Sun Valley, Inc., was formed in 1954 to engage in real estate development and promotion. It sold Florida homesites to Teamster members and others and its lots were advertised at Teamster meetings (G. 354–355; II A. 1406, 1468; III A. 1858, 1975–1976). The president of Sun Valley was Henry Lower, a Teamster official who had done public relations work for Hoffa's Local 299 of Detroit (I A. 589, 609–610; II A. 1468–1469). Pursuant to an undisclosed agreement entered into in January 1955, Lower secretly held 22½ percent of Sun Valley stock in trust for Hoffa (G. 147–148).* Hoffa also had an option from Lower to buy 45 percent of Sun Valley stock for $27,000 (G. 148), and had cosigned $75,000 worth

*This agreement, bearing Hoffa's signature (I A. 612; II A. 1471–1472), first came to light, after Lower's death, when it was discovered hidden in a cookbook in Lower's desk (I A. 619).

of Sun Valley notes on which he would be liable if the corporation defaulted in its obligations (III A. 1980–[illegible]).

In 1956, Sun Valley applied to the Florida National Bank of Miami for loans. It was agreed as a condition thereof that Hoffa's Detroit Local 299 would at all times maintain on deposit at the bank, in a non-interest bearing "restricted" account, an amount of money equal to or in excess of any outstanding loans made by the bank to Sun Valley (I A. 587–589, 597–598, 600–601). As of December 1956, $400,000 of Teamster funds, sent down by petitioner Hoffa, were in the bank in this restricted account, and Sun Valley was indebted to the bank for $399,000 (I A. 586–596, 591–592, 600–601; G. 259).

In late 1957 or early 1958, Sun Valley became delinquent in its loan obligations and the bank thereafter obtained a judgment against it in the amount of $399,000 (I A. 600–602; II A. 1399). In July 1958, Sun Valley filed a petition for reorganization under the Bankruptcy Act because it "was unable to meet its current liabilities as they became due" (I A. 556; III A. 1756).[1] In the late summer and early fall of 1959, Hoffa attempted, on three separate occasions, to withdraw Local 299's $400,000 deposit. The bank refused payment, invoking the "restricted" account agreement (I A. 595, 597; see also I A. 590–591). The de-

[1] These proceedings, originally instituted in the United States District Court for the Eastern District of Michigan, were, in September 1959, transferred to the United States District Court in Orlando, Florida (II A. 1406–1407).

posit of Local 299's funds in the bank and Hoffa's connection therewith and with Sun Valley were the subject of investigation by a Senate Committee in 1958 and of a grand jury investigation in Florida in 1960 (I A. 660, 675–676; II A. 1465–1469).

2. In the summer of 1958, shortly after Sun Valley had gone into reorganization, Dranow telephoned Stanton Sanson, a Florida business man (I A. 559, 564–565), and put Hoffa on the telephone. Hoffa told Sanson that he was anxious to get someone of Sanson's "standing" to revitalize Sun Valley; that this was a "must proposition" for him; and that it was "something that had to be done." He said that if Sanson agreed to take over Sun Valley, his pending loan application with the Pension Fund* would be approved and Pension Fund loans would also be made available for the development of Sun Valley (I A. 558–559). Sanson thereafter met with Dranow and Weinblatt—Dranow's financial nominee (III A. 1868, 1883–1884, 1953–1954). After investigating Sun Val-

*Sanson testified at the trial that some time before this conversation Dranow had told him that his loan "would be put through" for a 10% commission. The matter was dropped, however, when Sanson told Dranow that the commission arrangement would be specifically noted on the commission check (I A. 561–562, 565, 568, 648, 652). At Dranow's notification, Sanson came to Chicago to make a personal appearance before the Pension Fund Trustees in connection with the pending loan application (I A. 562). When advised that he was not on the trustees' agenda, Sanson notified Dranow who told him he would do something about it immediately. Sanson then returned to the trustee room and shortly thereafter Hoffa was called to the telephone. After this Hoffa told Sanson and an associate not to "worry, you will be heard". Shortly thereafter Sanson presented his case to the trustees (I A. 646, 648, 649).

ley, Sanson turned down Hoffa's offer (I A. 558–567, 642–645).* At about the same time Sanson's pending loan application was rejected (I A. 648).

3. In September 1958, petitioner Burris—earlier introduced by Dranow to Stanton Sanson as a "very close" friend, who had "great influence" with the Teamsters (I A. 562)—incorporated Union Land and Home Company (hereafter "Union") for the purpose of revitalizing Sun Valley (G. 93–94; I A. 562; II A. 1407; III A. 1983). Burris was acting as Dranow's "agent" in the transaction (G. 76, 79–80; I A. 562; II A. 1466). Hoffa knew of Dranow's unrevealed interest in the company (III A. 2015). In November 1958, Hoffa and Burris agreed that Union would pay off the promissory notes that Hoffa had cosigned for Sun Valley; that Union would also reimburse Hoffa's Detroit Local 299 for the interest lost on the $400,000 tied up in the restricted non-interest-bearing account in the Miami bank; and that, in exchange, Hoffa would give up his option to purchase Sun Valley stock (III A. 1981–1982). Union ultimately paid off all of Sun Valley's debts and took it out of reorganization, in substantial measure with money obtained through proceeds of Pension Fund loans, as hereafter described.

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*Sanson initially prepared an extensive negative report on the Sun Valley development (G. 174–186). However, after meeting with Dranow and Weinblatt, at Dranow's request, he softened the report's tone (I A. 560–561). Pursuant to Dranow's instructions, Sanson had the report hand-carried to Weinblatt with a cover letter, addressed to Dranow (G. 174–175; I A. 561).

B. THE MAJOR LOAN TRANSACTIONS

1. *The Connelly-Everglades transaction*

a. In the summer of 1958—at about the time Hoffa unsuccessfully sought to induce Sanson to take over Sun Valley and shortly before Burris and Dranow formed Union—Vaughan Connelly, owner of the Everglades Hotel in Miami, Florida, needed funds to finance renovation of his hotel which was to be performed by petitioner Kovens, a Miami contractor (I A. 623–624, 625–626, 688, 692, 770). Kovens suggested that Connelly seek a Pension Fund loan. When Connelly mentioned that it might "facilitate" the loan if he took over some Teamster property, Kovens suggested that Connelly take over Sun Valley (I A. 626). Shortly thereafter, Kovens brought in Dranow (at first under an assumed name) as a man "who could secure the loan with the Teamsters" (I A. 627–628). Dranow, in turn, brought in petitioner Burris as "an accountant for the Teamsters Pension Fund" (I A. 769) who "handled all his Teamster loan applications" (I A. 628).

In September 1958, Connelly, with Burris' assistance, filed an application for a $3,300,000 Pension Fund loan (I A. 628–629), for the procurement of which Connelly agreed to pay Dranow a $300,000 "fee" (I A. 628–629). At Dranow's direction, a copy of the loan application was forwarded to Hoffa (I A. 628, 653, 767). Meetings were thereafter held among Connelly, Kovens, Dranow and Hoffa to see if Hoffa could get the loan expedited (I A. 631).[10] At one of

[10] Connelly was advised of one of these meetings by his accountant who, after talking with Kovens, left a message: "Cal

these meetings, Dranow mentioned to Hoffa that Connelly was interested in Sun Valley, but Hoffa did not want to talk about it at the time (I A. 631). Dranow subsequently informed Connelly that "the boss" was trying to "loosen up the delays" (I A. 635). In December 1958, Connelly spoke with Hoffa directly in an effort to expedite the loan (I A. 636, 653). In January 1959, the loan application was approved by the trustees (including Hoffa) and Connelly received the first draw of $1,000,000 (I A. 655; see also I A. 636).

Dranow and Kovens then advised Connelly that the fee would have to be paid "immediately" and "under the table" (I A. 629–630, 656) and "that Mr. Hoffa was raising hell and expected it because he had paid all the money" (I A. 656). When Connelly balked at the need for immediate payment, both Dranow and Kovens told him that they did not want to see him hurt but that "these boys play rough" (I A. 657–658). The next day, Connelly delivered $100,000 to Dranow and Kovens in "small bills". Kovens burned the wrappers; Dranow stuffed the money in a bag, saying he was going "to Washington to deliver the money to the Boss" (I A. 658–659).[11]

b. In May 1959, both Dranow and Kovens advised Connelly "to keep out of sight" because Senate Com-

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was in. Said nothing new on the loan. Is going to try and get you and Grossman [Dranow] together Tuesday. The wheel, Mr. H., is going to be in town the latter part of the week, and will probably get to meet you on Friday, according to Cal" (I A. 767).

[11] At the time, Hoffa had an apartment at the Woodner Hotel in Washington, D.C. (II A. 1077; I A. 636, 653).

mittee investigators were in Miami "trying to link up Dranow and other pension [Fund] loans with the Teamsters and with Mr. Hoffa" (I A. 666). Connelly thereafter falsely denied to Senate investigators that Dranow was involved or that he had made "payoffs" for his Pension Fund loan. Hoffa subsequently thanked Connelly for his "fine statement", telling him that "he appreciated it" (I A. 674).

c. By late Spring of 1959, when Connelly was in need of another loan, Dranow said he could arrange it but that it was "going to cost more money" (I A. 663–664). Dranow and Burris thereafter helped with the preparation of the application for a $1,000,000 loan (I A. 664–665, 666–667), which, in July 1959, on Hoffa's motion, was tentatively approved by the trustees (II A. 1485–1486; I A. 666–667). When Connelly told Hoffa he needed the money immediately, Hoffa said he would get it, called an adjourned trustee meeting back to order, and informed the trustees that "Connelly has got to have his check today." Connelly received the check that same evening. At the time of receipt of the check, certain of the conditions under which the loan had been approved by the trustees were not yet satisfied—*i.e.*, the required mortgage on the property had not been executed (I A. 668; II A. 1485); the required inspection and appraisal of the property had not taken place (II A. 1485–1486; I A. 826); and the requisite Pension Fund service charge of $5,000 had not been paid (II A. 1489–1490; I A. 668).

d. In the early winter of 1960, Connelly talked to Hoffa about a "moratorium" on his Pension Fund

loan payments because of his tight financial position (I A. 671–672). Hoffa agreed to help. He advised Connelly to make his written request for a moratorium "stronger" and to get it to the Fund prior to a March 15 meeting of the trustees. Hoffa further advised him to stay away from that meeting, saying "I will call you if I need you" (I A. 673). The moratorium was thereafter granted (I A. 673).

e. In April 1960, Connelly appeared before a federal grand jury investigating Sun Valley and the Pension Fund. Kovens told him not to produce records showing his transactions with Dranow (I A. 675). After Connelly's appearance, he told Dranow that he made "false statements" to the grand jury. Dranow responded that it probably did not matter "because he had been in Orlando concluding a sale of Sun Valley property, and that it was being sold for a figure at a higher price than Mr. Hoffa or the Teamsters had put a loan on there * * * [and] that the grand jury would never, under those circumstances, in his opinion, return an indictment against Mr. Hoffa" (I A. 676). Two months later the Pension Fund foreclosed its mortgages on Connelly's hotel (I A. 676, 731). Almost $400,000 had been paid by Connelly as "fees" (I A. 676). About $15,000 of Connelly's receipts went toward the financial rehabilitation of Sun Valley (see *infra*, p. 32).

2. *The Strate-Pelican transactions*

a. In 1958 and 1959, petitioner Strate's Pelican States Hotel Corporation was building the Fontainebleu Motor Hotel in New Orleans, on leased land (II A.

1056–1059; 1100–1101; 1136–1137). During that period a number of Pension Fund loan applications for long-time financing were rejected by the trustees (II A. 1124–1126, 1151–1152, 1331–1332). As Hoffa explained it at a trustee meeting in March 1959: "We are very concerned about the question of leased land. * * * We cannot see the leased land" (G. 66).

In late April 1959, Kovens, who was approached concerning a Pension Fund loan, referred Strate's group to Dranow (II A. 1128–1129). After numerous arrangements concerning fees and methods of payment (II A. 1060–1063, 1130, 1136–1140; 1102–1103), it was agreed that Dranow would attempt to obtain a $1,350,000 Pension Fund loan for the Fontainbleu for a fee of $155,000 (II A. 1060–1063, 1102–1103). The loan application was filed by Strate on June 6, 1959 (G. 324). On June 15, he was introduced by Hoffa at a trustee meeting. Hoffa advised his fellow trustees of the pertinent factors relating to the loan, but made no mention of the "leased land" problem. The $1,350,000 loan was tentatively approved at this meeting. In July 1959, on Hoffa's motion, the trustees gave it final approval (II A. 1502–1505).

The next day, Dranow met with Strate and the latter's associates, informed them that the loan had been granted and demanded a $50,000 advance on his fee. He telephoned a Fund official and put Strate on the telephone so that the latter could be assured that there had been official approval of the loan (II A. 1064–1065). Dranow became excited when a suggestion was made that he be paid by check, saying he

did not know how this would look "with his people" (II A. 1066). During the next month, Strate delivered to Dranow more than $150,000 in cash which came from the Pension Fund loan proceeds (II A. 1066–1068, 1078, 1080, 1104, 1106, 1144).[12]

b. Shortly afterwards, Dranow agreed to procure another Pension Fund loan in exchange for a substantial stock interest in Pelican (II A. 1068–1071). At this time, George Burris was brought in as Pelican's auditor. In September 1959, Strate applied for a Pension Fund loan of $1,775,000, for additional construction at the Fontainebleu (II A. 1069–1070; 1506–1508), increased to $2,325,000 shortly thereafter for the addition of a restaurant (II A. 1507–1512). Preliminary approval from the trustees was obtained with the condition that the Pelican owners show a "firm commitment" in the project of one dollar for every two dollars to be loaned by the Fund (II A. 1505–1506, 1508–1509; see also II A. 1060–1070).

During the extended negotiations for the $2,325,000 loan the following representations (among others) were made by Strate to the Fund: (1) that Pelican had paid its architect, Tony Sherman, $72,000 for work on additions to the Fontainebleu whereas, in fact, Sherman had been paid only $30,000 for this purpose (II A. 1510; G. 120, 125; II A. 1155–1156; see also II A. 992); (2) that Pelican had $250,000 on deposit at the First National Bank of Gretna, Louisiana as part of its required equity (G. 119) whereas, in fact, this amount had been borrowed from the bank on the

[12] At this time Strate told Vaughan Connelly of the New Everglades that he was paying money to Dranow (I A. 675).

understanding that it would not be spent for the hotel and the money was withdrawn when "everything had been checked out relative to the loan" (II A. 1074–1076); (3) that some $575,000 of the loan proceeds would be spent on construction of a restaurant (II A. 1511–1512, 1516–1517) whereas, in fact, Strate did not intend to build such a restaurant (II A. 1075–1076) and no effort was ever made to build one.[13]

By January 1960, Pelican had not yet fulfilled the one-third "irrevocable share" requirement (II A. 1506; see *supra*, p. 15). On January 12, 1960, Hoffa, in a telephone conversation with the Fund's appraiser (Morris Lieberman), stated that the sponsors of the Fontainbleu would have $150,000 in the "till" within sixty days—"the amount of additional cash (one-third) required of the sponsors, to have in the project prior to any commitment" by the Fund (G. 126; I A. 830–831). The Fund thereafter issued its letter of commitment (G. 126–127), but the money was never contributed.

c. In the Spring of 1960, Dranow took Warren Rose, one of Strate's associates, on a tour of Sun Valley, told him that the company was "in some sort of bankruptcy proceedings" but that there "would be no difficulty selling all the lots in the subdivision with the help of Mr. Hoffa" (44 Tr. 6871). He asked Rose to invest in the project. Rose thereupon loaned Dranow $20,000, making the check payable (at Dranow's request) to petitioner Burris (II A. 1082).

[13] As was brought out in cross-examination of Strate, it was not until a year later (December 1960) in connection with a later Pension Fund loan that the Fund eliminated the requirement that the proposed restaurant be built with loan proceeds (102 Tr. 14612–14614).

In September or October 1960, Strate told Warren Rose that Dranow had told him he had "to put up" $50,000 for Sun Valley; that Dranow further advised him that Kovens and Hyman were also each required to provide $50,000 but that Kovens had not yet met his obligation (II A. 1084).

d. Government accounting evidence at trial showed that between March 1960 and November 1961, Pelican Corporation received some $3,350,000 from the Pension Fund for construction (III A. 1590–1592),[14] but only $2,100,000 of this amount was actually expended on new construction (III A. 1594). Almost $1,000,000 of the proceeds were used by Strate for stock purchases, repayment of loans and payments to himself (III A. 1592). In addition, $168,000 directly traceable to loan proceeds, went through Strate to Dranow ($55,125), to Weinblatt ($105,375) and to Bene Originals ($7,501), a corporation owned by Dranow (G. 246–255; III A. 1869).

In mid-1961, Strate advised the architect of the Fontainebleu, that he was going to replace Kovens as a builder and "build hotels all over the world" and that "he could get all the mortgages required because he had direct contact with Mr. Hoffa" (II A. 1156).

3. *The Hyman-Key West Foundation transactions*

a. In the Spring of 1959, petitioner Hyman, who, together with his wife, owned 50 percent of the stock of the Key West Foundation Company of Key West, Florida, agreed to pay petitioner Burris a fee if the

[14] In December 1960 and March 1961, Pelican had obtained two additional Pension Fund loans for construction at the Fontainebleu totalling $1,000,000 (G. 127).

latter would obtain a Pension Fund loan for Key West (II A. 879, 892–894, 896–899). An application was thereafter filed requesting a $875,000 loan, which listed as one of its purposes the building of a shopping center (G. 128–129). At a June 15 meeting of the trustees, Hyman stated that he expected to spend "$110,000, $115,000" on the shopping center (II A. 1493) and another $115,000 to pay off mortgages on apartment buildings owned by Key West (II A. 1491). He did not explain how the balance of the $875,000 was to be used (II A. 1490–1493).

Some five weeks later, the trustees (with Hoffa presiding) approved the $875,000 loan. It was described in the authorizing motion as "a construction loan to be converted to a first mortgage when the shopping center is finally built" (II A. 1493–1494). In the Fund's preliminary commitment letter of August 3, 1959, signed by Hoffa and another trustee, setting forth the conditions of the loan, it was stated as "understood" that the loaned funds would be used to construct the shopping center (G. 287–294). In the next few weeks, however, amendments (again bearing the signature of Hoffa and another trustee) were made providing that a portion of the loan could be used to pay off existing mortgage loans on Key West's apartment houses (G. 281–283); that Hyman could draw $715,000 of the loan proceeds as soon as the loan was finally approved, the remainder to be drawn during the course of construction of the shopping center (G. 284–286); and that $160,000 of the loan was for construction (G. 285). There is no indi-

cation that any of these revised conditions was ever discussed or approved at trustee meetings.

In the early fall of 1959, Dranow told Vaughan Connelly of the New Everglades, that he was trying to get a Pension Fund loan for Key West which would be sufficient to pay off the mortgages on the apartment houses and still leave Hyman $300,000 cash, and that this amount and "other monies" coming to Dranow could then be used "for helping on the Sun Valley Payment of the loan to get Mr. Hoffa out of his loan position" (I A. 671).[15]

b. The loan funds were disbursed in November 1959 (III A. 1689–1690). Approximately $500,000 was diverted from Key West Foundation by Hyman as follows: $125,000 to purchase the stock of co-owners (Dr. and Mrs. Maurice Rose) in Key West Foundation (II A. 880–881, 894; III A. 1692); $200,000 to Hyman and his wife (III A. 1692); $75,000 to Hyman's Acme Corporation (III A. 1692; G. 351–352); $100,000 through Acme Corporation to Burris' Zenith Corporation and through Zenith to Burris, Dranow and their associates (G. 168–169, 347). The payment of $100,000 to Zenith Corporation was made at the request of petitioner Burris and represented Hyman's investment in Union, the company formed to take Sun Valley out of bankruptcy (II A. 894–895, 900; see *supra*, p. 9).

c. In May 1960, Hyman filed another loan application, this time for a $400,000 Pension Fund loan to

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[15] Dranow also told Connelly that "he had talked to Mr. Hoffa" about using some of the Key West Loan money to aid New Everglades (I A. 674).

renovate and remodel the Poinciana Apartments in Key West (G. 132–133, II A. 1497). At a trustee meeting in June 1960, Hoffa urged approval of the loan stating that "Sears Roebuck is building a $55,000,000 expansion there * * *. They own the whole thing. The shopping center is within one block of the apartments" and that, in addition, "the government is moving in 15,000 people to Key West" (II A. 1497). On Hoffa's motion, the trustees immediately approved the $400,000 remodeling loan (II A. 1497–1498). In actual fact, Sears was not then spending or contemplating spending $55,000,000 [16] or any money on a shopping center in Key West, it was merely spending money on routine maintenance in its catalogue sales office (III A. 1732, 1734); nor was the government contemplating the movement of any additional personnel to Key West (III A. 1735–1736).

A condition of the $400,000 loan was that the total cost of remodeling be not less than $600,000 (G. 134–135)—*i.e.*, Hyman would have to expend one dollar for every two dollars loaned by the Fund. Additionally, to secure construction "draws", detailed, written proof of expenditures had to be submitted to the Fund (G. 135–137; II A. 904, 907–908). By November 1960, Hyman had withdrawn the full $400,000

[16] The reporter who transcribed the minutes of this trustee meeting testified that the 55 million dollar figure was a typographical error and that it should read 5 million dollars (III A. 1851–1852). But she earlier testified that she never received any complaint from the Pension Fund as to the accuracy of her transcriptions (I A. 620). And, in any event, the evidence showed that Sears was planning to do no more than routine maintenance in a single office.

(G. 323–324; II A. 918–919) on the basis of documentary "proof" purporting to establish the expenditure of $706,000 on remodeling. This "proof" was false in the following respects:

(1) The documents purported to show a payment of $50,400 to Mid-Florida Paving Company (G. 142; II A. 908). Actually, Mid-Florida had been paid "around $10,000 or $12,000" (II A. 935–936). The signature of its owner on various receipts submitted by Hyman to the fund had been forged (II A. 938–939).

(2) The documents purported to show a payment of $656,000 to Black Construction Company (G. 138–145). The "Black Construction Company" was actually Cecil Black, a salaried employee, doing carpentry and masonry work at the Poinciana apartments with some helpers. During the period in question, he never received more than $125 per week for himself (II A. 919–930).[17] Some $50,000 of this loan actually was used to pay off Sun Valley creditors (see *infra*, p. 32).

d. Government accounting evidence based on the books and records of Key West Foundation revealed that during the period February 1960 through October 1960, less than $186,000 (not $706,000 as asserted

[17] Black testified further that Hyman purchased the Black Construction Company stationery (II A. 920, 923), provided the telephone number (II A. 924) (since Black had no office (II A. 919)), and prepared the waivers of lien because Black did not know what they were (II A. 923–924). Black would sign the waivers without reading most of them (II A. 924–925). He signed these waivers because he liked Hyman and wanted to help him (II A. 934).

by Hyman) had been spent on construction and maintenance (III A. 1693). From November 1959 through December 1960 (*i.e.*, the period covering the first and second loan), the company's total expenditures on construction and maintenance did not exceed $252,000 (III A. 1693). Petitioner Burris' accounting firm did the auditing during this period (III A. 1720, 1776).

e. In 1962, Hyman obtained Pension Fund loans for two hotels he owned in Key West—La Concha and the Casa Marina—in the amount of $433,000 with the promise that $217,000 more would be forthcoming, if the hotels were leased to a responsible hotel operator (G. 295–310, II A. 890–891; I A. 828–829). Shortly thereafter, Hyman signed leasing agreements for both hotels with Charles Lavin, an alleged operator of hotels for retired persons, who was then working for Hyman as a salaried employee at $100 per week (II A. 882–888). Lavin supplied Hyman with a letter, which Hyman forwarded to the Fund, promising high earnings for both hotels (II A. 887–889). The additional $217,000 was thereafter authorized by the trustees and disbursed to Hyman (G. 303–304). Lavin operated neither hotel under the leases and was discharged after Hyman had received the additional loan funds (II A. 882, 890).

4. *The Dranow-Burris First Berkeley transactions*

a. In 1959, First Berkeley Corporation of Los Angeles, California, was formed by petitioner Burris, who became its President, with Irving Link and Samuel Rosenberg as officers (II A. 1171, 1188, 1220). Some time before, Dranow had told Link and other

potential California investors that he was in a good position to secure Pension Fund loans because he knew Hoffa "very well" (II A. 1191, 1189, 1220, 1221) and that his associate, George Burris, was "the medium" for drawing up Pension Fund loan applications (II A. 1184–1190, 1219–1220).[18] In March 1960, the Pension Fund granted First Berkeley a loan of $2,966,000 (on the applications prepared by Burris, II A. 1192, 1193) to purchase the Connell buildings in downtown Los Angeles. The loan was secured by a mortgage on these buildings and was granted on condition that First Berkeley post substantial additional collateral (II A. 1534–1536).

The following false representations were made (primarily in papers filed with the Pension Fund on March 12, 1960):

(1) That the net worth of the corporation was $3,673,600 (G. 314–315). In reality, its net worth at that time was $634.17 (II A. 1559–1560).[19]

(2) That First Berkeley owned 97½ percent of the stock in Ruedd, Inc., which had a value of $680,550 (G. 315, 321). In reality, petitioner Kovens, not First Berkeley owned Ruedd, Inc., and Kovens had allowed First Berkeley to pledge his shares in Ruedd for $75,000 (G. 351).

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[18] Dranow also advised the California group at this time that he had obtained loans for the Fontainebleu, the Everglades and for a "Miami Hospital"—the Good Samaritan Hospital loans discussed *infra*, pp. 25–28.

[19] On the same date that this $3,673,000 figure was submitted, Dranow wrote to the Fund that "the lowest value you can really place on our equity" was close to $2,700,000 (G. 322).

(3) That First Berkeley owned the Fashion Mart building in Miami, which had an appraised value of $675,000 and a net value of $380,000 (G. 315, 321). Actually one Irving Kipnis (for whom Burris was then negotiating a Pension Fund loan on other property) (II A. 1384–1386),[20] had purchased Fashion Mart for $375,000 with 57 to 58 thousand dollars down and the remainder in purchase money mortgages. At the end of March 1960, he sold his equity in the building to First Berkeley for $85,000. The promissory note given to him in this amount was signed by George Burris and cosigned by one Lou Poller (II A. 1384, 1385).

(4) That Charles Gouert, a Los Angeles appraiser, had appraised the Connell buildings as having a market value of $4,250,000 and the Beverley Wilshire Health Club (for which another Pension Fund loan was granted) in which First Berkeley had a leasehold, at $942,500 (G. 318, 321). In actual fact, Gouert had never appraised the Connell buildings and had appraised First Berkeley's leasehold interest in the Health Club at $300,000 (II A. 1419).

On April 1, 1960, when First Berkeley had a bank balance of $194.66, it deposited $150,000 of the Pension Fund loan proceeds in its account. From these funds, $10,000 was paid to petitioner Burris and $75,000 to Kovens' Ruedd, Inc. (II A. 1565–1567; see G. 354). On May 12, 1960, the $2,816,000 balance of the loan was applied to the purchase of the Connell buildings (II A. 1570–1571).

b. On May 18, 1960, Dranow told Irving Link (an

[20] The Kipnis Causeway Inn transaction is outlined, *supra*, pp. 20–21.

officer of First Berkeley) that he needed $125,000 "immediately" to "divert some of it to a Sun Valley problem they had" (II A. 1193). Link and his associate, Murray Randolph, thereupon borrowed $125,000 from one Jack Factor, and made it available to Dranow and Burris (II A. 1194–1196). Portions of these funds went to pay interest to Teamsters' Local 299 and to pay off Sun Valley creditors (G. 453–455; see *infra*, p. 32).[21]

5. *The Kovens-Good Samaritan Hospital transactions*

a. In the summer of 1959, petitioner Kovens and one Bert Sager decided to apply for a Pension Fund loan to build the Good Samaritan Hospital in Miami, on land under lease to Kovens' Ruedd Corporation[22] (II A. 1303). Petitioner Burris helped in the preparation of a loan application (II A. 1273–1274, 1303–1305). In late September 1959, Sager appeared at a trustee meeting and requested a $2,300,000 loan. It was approved at 6½ percent interest with the proviso (stated by Hoffa) that the borrower would have to put $950,000 in escrow before any of the loan proceeds would be paid. Sager advised that he intended to sell debentures to obtain the $950,000 (II A. 1305–1306; G. 170).[23]

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[21] Funds from an additional Pension Fund loan to First Berkeley in 1961 was used to pay third parties from whom monies had been borrowed to repay the earlier "Factor" loan (G. 455–459).

[22] Ruedd was the corporation whose stock Kovens had "loaned" to Burris and Dranow in the First Berkeley deal (see *supra*, p. 23).

[23] In October 1959, Dranow, Burris and Strate pointed out a site in Miami to one of Strate's associates and stated "they were going to build a Hospital there" (II A. 1143–1144).

In December 1959, having been advised by Kovens that Sam Rosenberg (one of Dranow's associates in the First Berkeley Corporation, *supra*, p. 22) was going to provide a substantial amount of the needed capital, Sager so informed the Pension Fund (G. 341–342; II A. 1307). Rosenberg was notified by Fund representatives who asked what steps he had taken in this direction (G. 171; II A. 1223–1224). Rosenberg was "shocked" when he received the Fund's letter since he had never heard of the matter. He discussed it with Dranow who told him to "[f]orget it" (II A. 1223–1224).

Kovens thereafter told Sager that he would purchase $750,000 in debentures, that Rosenberg would put up the remaining $200,000 and that the Fund should be so advised (II A. 1308–1309). On January 12, 1960, Hoffa informed the appraiser for the Pension Fund that he could proceed with the appraisal because $750,000 in debentures had been sold and the hospital sponsors had received an additional $200,000 (G. 172; I A. 833). In fact, no debentures were ever issued or sold, nor did Rosenberg invest $200,000 in the hospital (II A. 1224, 1309).

In May 1960, Hoffa urged at a trustee meeting that final approval of the loan be granted, at a lesser rate of interest than had originally been fixed by the trustees—*i.e.*, 6¼ percent instead of 6½ percent. Hoffa further stated at this meeting that "the Dade County people themselves, I understand, are leasing the hospital and are going to operate it," and that "Dade County is putting in as much money or more than we are putting in the hospital * * *" (II A.

1286). The trustees agreed to this reduction (II A. 1285–1287). In actuality, Dade County never intended to nor did it ever invest in the hospital (II A. 1282–1283).

b. Two conditions for the loan were prescribed: (1) the sponsors were required to make a $200,000 escrow deposit in substitution for the earlier $950,000 requirement (II A. 1271); and (2) Kovens was required to obtain a construction bond from a bonding company, which had agreed to write the bond only if Kovens showed evidence of a $250,000 investment in the hospital (II A. 1278–1290, 1293, 1313–1314). Kovens borrowed $250,000 from a Miami bank (on a note cosigned by Irving Kipnis, who had furnished Fashion Mart to George Burris in connection with the First Berkeley transaction (G. 352; see *supra*, p. 24)), and used that amount both to satisfy the bonding company requirement and the $200,000 escrow deposit requirement. The Pension Fund then paid part of funds committed on the loan (II A, 1267–1270, 1311, 1269–1272, 1280). In actuality, Kovens had withdrawn the entire $250,000 and used it to purchase a certificate of deposit from the bank as security for the original loan, with the agreement that the bank would not call up the loan for several months. Subsequently Kovens cashed in the certificate of deposit and repaid the bank (G. 347–350).

c. In June 1961, several months after the disbursement of the original loan, an additional $500,000 was requested for "an increase in the size of the building" (II A. 1270, 1316). Hoffa subsequently advised his fellow trustees that the $500,000 loan thereafter

granted had been used "to add another floor" to the hospital (II A. 1540). At that time, the hospital contained three useable floors; at the time of the trial no additional useable additional floor had been added, even though the additional $500,000 had long been disbursed (II A. 1305, 1325; III A. 1821, 1829, 1992). After the hospital was built, Sager paid Kovens a fee of $200,000 and sold him a 90 percent interest in the hospital for $20,000 (II A. 1318).

C. OTHER LOAN TRANSACTIONS

In addition to the five major transactions already described, the government introduced evidence of other Pension Fund loan transactions in which various of the petitioners were involved.

1. *The Strecker-4306 Duncan transaction*

In 1959, Fred Strecker, a Pension Fund trustee, was seeking a loan to finance a property acquisition in St. Louis, Missouri, by the 4306 Duncan Corporation, with which he was involved (II A. 1336–1337). At a trustee meeting in September 1959, he met with Burris who agreed to assist him in procuring a loan, and suggested that they go to Miami to see a friend. Hoffa wished Strecker "good luck" (II A. 1339–1340).

In Miami, Burris and Strecker met with Dranow and Vaughn Connelly of the New Everglades (see *supra*, pp. 10–13). During the course of these consultations, Dranow said he ha dspoken to Hoffa on the telephone (II A. 1426–1427). In October and November 1959, through the activities of petitioner Burris, a Pension Fund application for 4306 Duncan was

processed in the name of one Max Federbush who, in early December 1959 (before the application was passed upon by the trustees), was told by Burris that he was out of the deal (II A. 1346–1371). About two weeks later, just before he entered the trustee meeting which was to consider the loan application, Strecker met Dranow who told him that the application was going to be presented "in the name of a straw party" (II A. 1346). Strecker was distressed over this and objected to Hoffa about such a procedure. Hoffa said: "If that's what you want. Do you want the loan or not?" (II A. 1347). The loan was thereafter approved by the trustees on Hoffa's motion (II A. 1348). Although there is nothing in the minutes to show it, both Hoffa and Strecker testified that prior to the trustee vote Hoffa advised the trustees that "[t]his application is a property that [Strecker] is interested in" (II A. 1347). Strecker's 4306 Duncan Corporation ultimately received $840,000 from the Pension Fund (II A. 1349).

2. *The Kipnis-Causeway Inn transaction*

In 1960, Irving Kipnis who had been involved in the First Berkeley transaction (see *supra*, p. 24), asked George Burris to help him get a Pension Fund loan to build the Causeway Inn. Petitioner Burris thereafter prepared an application for a $1,500,000 loan (II A. 1384).[24]

[24] In 1958, after Kipnis had been turned down by the Fund on a loan application, Burris told him he had not presented his application in the right manner and that if, in the future, Kipnis had "a reasonable proposition" he should contact Burris (II A. 1383–1384).

While the application was pending, Burris asked Kipnis to buy a 10% interest "in a group" being formed to buy the land belonging to Sun Valley; Union Land and Home Company had been formed for this purpose, by Burris (see *supra*, p. 9). Kipnis asked if "that was a piece of land about which there had been some talk that Mr. Hoffa or the Pension Fund was involved," and Burris agreed (II A. 1385). Kipnis gave Burris $57,000 for an option on 10 percent of Sun Valley with the further agreement that it would turn into a loan if Kipnis decided not to exercise the option (II A. 1386).[25]

In October 1960, Kipnis received a $1,500,000 Pension Fund loan (II A. 1387–1388), and Kovens was hired to build the Inn (II A. 1388). In Mid-1961 and 1963, with Burris' aid, at a fee of $15,000 plus half interest in Causeway, Kipnis received another $350,000 Pension Fund loan (II A. 1389–1390).

3. *The Simon-Airport Hotel transaction*

Between 1959 and 1961, George Simon,[26] with Burris' assistance, secured $3,000,000 in loans for the construction of hotels at the Miami and Birmingham airports. Simon paid Burris $85,000 in "fees" for the latter's services in procuring the loans.

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[25] This money was used to rehabilitate Sun Valley (see *infra*, p. 33). It was repaid by Burris in 1961 out of fees he received for procuring the loan for Causeway (II A. 1390–1391).

[26] Simon was a Miami accountant whose stationery Burris had used to make the March 12, 1960, representations to the Pension Fund to procure a loan for First Berkeley (see *supra*, p. 23).

4. The Club 300 transaction

In June 1961, one James Dioguardi advised Hoffa that he wanted a Pension Fund loan to develop some land in New Jersey. Hoffa told him to see Burris for assistance in preparing a loan application (I A. 582–583). After a series of meetings, Burris and Dioguardi decided to apply for a loan on the "Club 300" in New Jersey (I A. 583–584).

Dioguardi ultimately received a $900,000 Pension Fund loan (II A. 1411–1412). Burris' son, Herbert Burris (who was acquitted by the trial judge at the close of the government's direct case) received a fee of $12,000 and was put on the Club 300's payroll as an employee of the club. He actually did no work for the club (I A. 584–585; II A. 1392–1393).

D. THE DIVERSION OF FUNDS TO SUN VALLEY

We have already detailed (see *supra*, pp. 7–8) Sun Valley's difficulties in 1958 and the fact that Hoffa's Detroit local had $400,000 "frozen" in the Florida bank. Within three years—the major part of the period when the loan transactions were taking place—the various difficulties were settled. In October 1959, Union paid the Detroit local some $37,000 in interest on its restricted account (II A. 1554); paid Lower $18,000 for his stock in Sun Valley (II A. 1407–1408, 1466, 1554, 1556); paid off all the debts of Sun Valley (some $600,000) (II A. 1399), including its $400,000 debt to the Florida bank (II A. 1399). The result was that the Detroit local was allowed to withdraw its $400,000 from the Florida bank (I A. 588–598), and

Sun Valley was withdrawn from reorganization and judicially declared to be solvent (II A. 1403).

A portion of the monies used to these ends are directly traceable to the Pension Fund loan proceeds heretofore described. Additional funds, while not traceable directly, are so closely connected with petitioners and the various companies procuring loans from the Pension Fund as to justify the inference that they were siphoned from loan proceeds:

1. Creditors of Sun Valley were paid in part with $50,000 from Hyman's Key West Foundation; $50,000 from Strate's Fontainebleu, and $43,000 from First Berkeley (see G. 150–152, 153–161). The interest (some $37,000) paid by Union to the Detroit local on its $400,000 in the Florida bank was derived in part from Pension Fund loans to Hyman's Key West Foundation, First Berkeley and Vaughan Connelly (G. 164–166, 166–168). In addition, $18,000 which Burris used to purchase for Union the Sun Valley stock of Henry Lower was derived from the Kovens' Construction Company account in a Miami bank (86 Tr. 12878–12879; G. 161–164). Kovens' Construction Company had been paid fees from Pension Fund loans for work done at Connelly's New Everglades (see *supra,* pp. 10–13). It later received fees for construction of the Good Samaritan Hospital (see *supra,* pp. 25–28) and the Causeway Inn (see *supra,* pp. 29–30).

2. At the same time, Dranow convinced various Miami businessmen to purchase shares in Sun Valley for $250,000 (II A. 1404–1405; see also II A. 1400, 1402). Through an emissary, Dranow contributed $143,000 (compare II A. 1402–1403, III A. 2030, with

III A. 1865). Of this amount $57,000 was the check Irving Kipnis of the Causeway Inn had earlier given to George Burris (III A. 1865–1866, see *supra*, p. 30).

ARGUMENT

Petitioners tender for review a variety of issues, none of which has importance outside of its particular factual context. No significant or recurring question of law or conflict among the circuits is involved. There is, in short, no reason for further review by this Court.[27]

1. The evidence (set forth in the Statement, *supra*, pp. 4–33) established, as the majority of the court below found, a unitary criminal scheme in which each of the petitioners played diverse but complementary roles.[28] The core of the scheme was the fraudulent procurement of money for the personal benefit of petitioners from the Pension Fund; the unlawful conduct of all the conspirators began with and was prompted by a scheme to save the Sun Valley venture from bankruptcy. Falsely inflated loan applications were filed with the Fund and they were approved by exploiting petitioner Hoffa's position of trust and dominance on the Board of Trustees of the Fund. Petitioner Hoffa's principal purpose in the criminal plan was the financial rehabilitation of the Sun Valley

[27] For the Court's convenience, our Argument follows the sequence adopted by petitioners.

[28] Since the conspiracy count conviction fully supports the sentence imposed on each petitioner, there is no occasion to determine the sufficiency of their convictions on the various substantive counts. *Lawn* v. *United States*, 355 U.S. 339. Nor do petitioners challenge the sufficiency of the evidence on these substantive counts.

enterprise since he had been harmed by public disclosure of the involvement of Teamster Funds in that venture. Dranow and Burris (and, to a lesser extent, Kovens), who were variously Pension Fund "borrowers", agents for the procurement of loans and participants in the rehabilitation of Sun Valley, assisted in rescuing Sun Valley and were also motivated by desire for personal enrichment—increasingly so as their efforts on behalf of Sun Valley revealed the ready opportunity for individual financial gain from Pension Fund loans. Strate and Hyman were primarily borrowers from the Fund who, knowing of the overriding goal, joined the scheme with the understanding that to obtain loans for themselves and their projects they would have to divert funds to Sun Valley. Weinblatt, whose lesser role was recognized by the trial judge in imposing sentence,[29] participated as Dranow's *alter ego* in several of the transactions. The extrication of Sun Valley was thus both the catalyst for the scheme and the cohesive link which bound petitioners together.

In short, this case is not governed by *Kotteakos* v. *United States,* 328 U.S. 750,[30] (as petitioners argue Pet. 56–61), but by *Blumenthal* v. *United States,* 332

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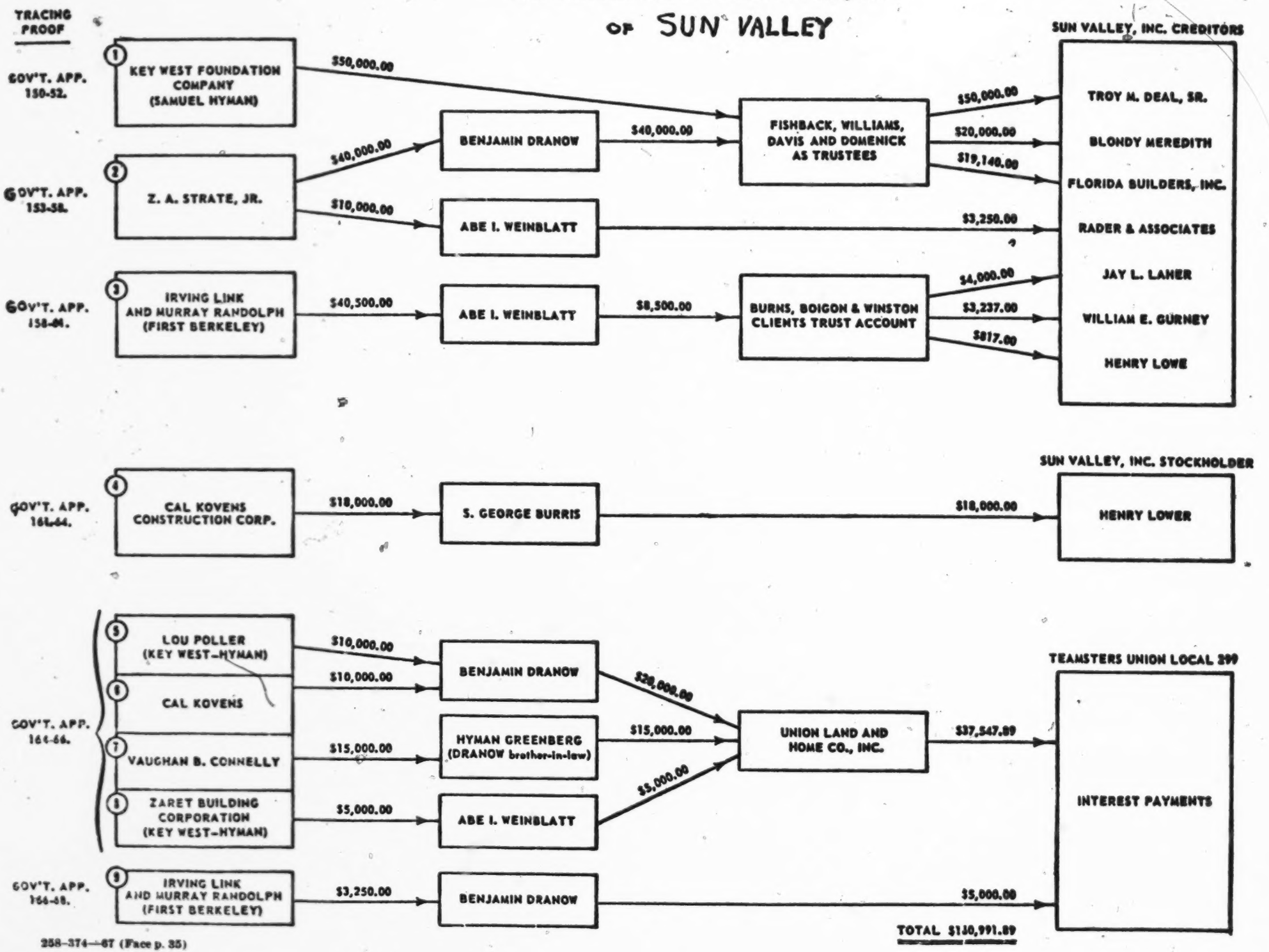
[29] He was confined for 1 hour in the custody of the United States Marshal and fined $5,000.

[30] In *Kotteakos*, the government conceded in this Court that its evidence established eight legally separate conspiracies but argued that the defendants were not fatally prejudiced by the joinder. In rejecting this argument, the Court concluded that, in the circumstances of the case, reversible error flowed from the joinder because of the "dangers of transference of guilt from one to another across the line separating conspiracies, * * *" (328 U.S. at 774).

THE FINANCIAL REHABILITATION OF SUN VALLEY



U.S. 539. Here, as in *Blumenthal,* all the participants were "parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal." 332 U.S. at 558. Surely—as even the dissenting judge below recognized (Pet. App. A 60)—petitioners Hoffa, Dranow and Burris, who were involved in all or a preponderant number of the fraudulent loan transactions, cannot complain that they were charged with too few conspiracies. See *Canella* v. *United States,* 157 F. 2d 470, 478–479 (C.A. 9); *Quirk* v. *United States,* 161 F. 2d 138, 142 (C.A. 8); *Ritter* v. *United States,* 230 F. 2d 324, 329 (C.A. 10); *Monroe* v. *United States,* 234 F. 2d 49, 54 (C.A.D.C.), certiorari denied, 352 U.S. 873; *United States* v. *Sing Kee,* 250 F. 2d 236, 242 (C.A. 2), certiorari denied, 355 U.S. 954. Kovens, Strate and Hyman participated in fewer of the conspiracy's loan transactions but they were fully cognizant—at least as much as the salesman-defendants in *Blumenthal*—that their acts were part of a larger scheme to enrich the principal participants and to extricate Sun Valley from its financial difficulties.

The testimony of Strate's partner that Strate had told him of a meeting at which Dranow demanded that Kovens, Hyman and Strate put up $50,000 each to assist the Sun Valley project (II A. 1084) is indicative of the nexus among the conspirators and ties them into a single unlawful venture. The attached chart, which traces a substantial portion of the funds used for the rehabilitation of Sun Valley, shows how petitioners Kovens, Hyman and Strate

were substantially involved in funneling money to that venture.

It is not significant that the government's evidence did not show that Hoffa was aware of every detail of the arrangements among Dranow, Burris, Kovens and the other borrowers. The proof clearly justified the inference that he knew that they were working together to drain off money from the Pension Fund to Sun Valley. Similarly, it was not fatal to the government's case that Strate and Hyman did not participate in all the loans, since the proof plainly showed that they were aware of the general scheme and knew that the price for their loans was to join the plan to rescue Sun Valley. It is well established that conspiracy is not fragmented into separate crimes because the conspirators may have had different motives or objectives. See *Pinkerton* v. *United States,* 328 U.S. 640, 643; *United States* v. *Manton,* 107 F. 2d 834 (C.A. 2), certiorari denied, 309 U.S. 664; *May* v. *United States,* 175 F. 2d 994, 1002 (C.A.D.C.), certiorari denied, 338 U.S. 830; *United States* v. *Beck,* 118 F. 2d 178, 182–183 (C.A. 7), certiorari denied, 313 U.S. 587.

Nor did the trial court err in permitting all the admitted evidence to be considered against each petitioner. See *Isaacs* v. *United States,* 301 F. 2d 706, 724 (C.A. 8), certiorari denied, 371 U.S. 818; *Koolish* v. *United States,* 340 F. 2d 513, 522–523 (C.A. 8), certiorari denied, 381 U.S. 951; *United States* v. *McCormick,* 309 F. 2d 367 (C.A. 7), certiorari denied, 372 U.S. 911; *United States* v. *Zuideveld,* 316 F. 2d 873, 878 (C.A. 7), certiorari denied, 376 U.S. 916. In pre-

senting the evidence upon which this complex scheme could be evaluated, the government was obliged to show the complicated and continuing relationships among the parties, the variety of roles played by each, and the mechanics of the various transactions. See *United States* v. *Dardi,* 330 F. 2d 316, 332 (C.A. 2), certiorari denied, 379 U.S. 845, 869. Evidence pertaining to loans which did not demonstrably assist the Sun Valley enterprise was admissible against all the conspirators, for example, to show the general nature of the scheme—*i.e.,* Hoffa's active promotion of loans for which Burris and Dranow had been promised fees.[31] As the Second Circuit observed in *United States* v. *Dardi, supra,* 330 F. 2d at 329: "Those who participate in such transactions do not supply the government with a simple and clear picture. The picture, even as on a jig-saw puzzle, only comes into vision by the assembling of hundreds of curiously shaped parts, each piece seemingly having no identity until it is fitted into and made a part of the whole." See also *Capriola* v. *United States,* 61 F. 2d 5, 13 (C.A. 7), certiorari denied, 287 U.S. 671.

Nor was this a case in which confessions admissible only against one party but naming other defendants were introduced in evidence.[32] The evidence

[31] The Miracle Plaza loans, concerning which very little evidence was introduced, were similarly relevant to show the relationship among the parties, particularly to indicate how Dranow would refer to his prior successful dealings with the Pension Fund in order to impress prospective borrows.

[32] In *United States* v. *Wortman,* 326 F. 2d 717 (C.A. 7), on which petitioners rely (Pet. 59–60), a mass of evidence, some dealing with declarations of one conspirator against another

concerning loans which did not involve petitioner Strate and Hyman revealed the pattern whereby petitioner Hoffa's domination of the Pension Fund was, with his active cooperation, used by the other petitioners to drain off money for his benefit and for theirs. It did not impermissibly prejudice the jury against any of the less directly involved conspirators because its only effect as to them was to establish precisely what could permissibly be proved against them—the nature of the conspiracy which they voluntarily joined.

There is no substance to the claim (Pet. 60–61) that the trial court failed adequately to instruct the jury that it could convict on the conspiracy count only if the evidence established that the petitioners were involved in a single conspiracy. The jury was specifically told that, to convict any defendant on a substantive count, they were required to find that he had been a party to the overall scheme and, with respect to the conspiracy count, that he had been a member of the conspiracy alleged in the indictment (III A. 2139–2141, 2143–2144). The indictment, which the court read to the jury, made clear that the petitioners were charged with being members of a single conspiracy (see III A. 2113–2132), and the court referred to "the scheme charged in the indictment" (III A. 2139; see also III A. 2140, 2141). With specific reference to the conspiracy charge, he informed the jury that it "charges the defendants on

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without any proof *aliunde* of the conspiracy, and some involving different persons and different time periods, was improperly admitted in evidence as proof of the conspiracy.

trial with the crime of conspiracy;" that to warrant conviction the government had to prove beyond a reasonable doubt "the existence of *a* conspiracy" (III A. 2142; emphasis added); and that, while it need not be shown that a defendant knew all the members, or all the details of the conspiracy, it was essential that "a defendant was aware of the common purpose, and that he was a willful participant" (III A. 2143). The instructions adequately stressed that the jury had to find a single conspiracy to support a finding of guilt. Petitioners point to no requested instructions relevant to this contention which were refused by the trial court.

2. Viewed against the factual background which prompted his action, the fact that the trial judge had the bailiff deliver the indictment to the jury shortly after deliberations commenced, without advising the parties or counsel of his action, did not constitute reversible error (see Pet. 18–21, 61–65).

Early in his discussion with counsel concerning the instructions, the trial judge indicated his concern that the jury would need guidance in relating the proof to the twenty-one remaining counts of the indictment.[33] He therefore proposed to give the jury verdict forms which would identify the counts by the transactions with which they dealt—*e.g.*, "Everglades in regard to count 2" (see I A. 55). The court felt that otherwise the numbers of the counts would mean "nothing to them" (G. 194). The next day, all defense counsel

[33] Seven substantive counts had been withdrawn from the jury at the close of the government's case-in-chief (III A. 1773).

rejected this suggestion.[34] When the court asked for "any suggestion as to how the jury could identify counts if all they have is numbers," the defense submitted no alternative proposals. On the contrary, counsel for Strate, with the apparent approval of all defense counsel, described the problems as "one of the hazards of a mass trial * * * where the Government chooses to do it in this fashion. I think they have got to meet that hazard" (G. 200–201).

Defense counsel also opposed a proposed government instruction which would have summarized for the jury the remaining charges in the indictment without referring to the seven counts which had been dismissed (G. 203–206; 212–214). Having advised counsel that he "didn't plan to" send the indictment to the jury (G. 204), the judge decided, in view of these objections, merely to read the indictment (G. 219).

At the outset, the trial judge admonished that "the indictment which has been returned by a grand jury is not any evidence of guilt and must not be construed by you as such. Indictments are mere formal charges made by a grand jury after having heard certain evidence presented to it by the government" (III A. 2113). And during his reading of the indictment, the court interjected that it contained "mere allegations * * * which are not proof of anything" (III A. 2115). The court did not summarize the seven dismissed counts, stating that they "are not before the jury, and will be of no concern to this jury" (III A. 2132). After completing his reading of the indict-

[34] Government counsel had earlier indicated his approval of the procedure suggested by the trial judge (G. 194).

ment, the judge once again cautioned that the indictment was not evidence and should not be considered by the jury in reaching its verdict (III A. 2133, 2134).

The case was submitted to the jury on a Friday afternoon. Early that same evening, the bailiff, at the request of the jury, delivered a sealed envelope to the court (III A. 2226–2229, 2176–2178) which contained a note signed by all the jurors. It read (III A. 2179–2180; see Pet. 18):

1. Document of all counts
2. Document of law on all counts
3. Document of overt acts named
   Please return [35]

Upon receiving this note, the court gave a copy of the original indictment to the bailiff with instructions to "tell them that pursuant to their request they could have this and nothing more" (III A. 2180). The bailiff testified that he complied with the court's directive (III A. 2180, 2234) and, in response to a more precise question, that he had said nothing to the jurors when he handed the copy of the indictment into the jury room (III A. 2232).

a. The judge committed no error when he gave the indictment to the jury at its request. The court would have been acting well within its discretion had it submitted the indictment to the jury at the outset of its deliberations. See *United States* v. *Press*, 336 F. 2d 1003, 1016–1017 (C.A. 2), certiorari denied, 379 U.S.

[35] Above these three items, the note contained a list of the remaining counts; on the left side it contained an enumeration of the seven dismissed counts; and on the right side it contained the notation "Work papers" (see Pet. 18).

965. The court could make its own judgment that the jury needed the indictment for its deliberations. Cf. *Robinson* v. *United States*, 320 F. 2d 29, 32 (C.A.D.C.) where it was held to be within the trial court's discretion to deliver exhibits to the jury *sua sponte*. The fact that the court here waited until after deliberations had commenced and the jury had specifically made a request did not constitute error.

Nor were petitioners prejudiced because the jury was given an unexpurgated copy of the indictment. The trial judge—before, during and after he had read portions of the indictment to the jury—repeatedly emphasized that these were merely charges and were not "proof of anything" (see *supra*, p. 40). He specifically noted that the seven dismissed counts were not before the jury and should be of no concern to them (see *supra*, p. 40).

Nor, in light of these warnings, was petitioners' trial rendered unfair merely because the indictment given to the jury alleged that petitioner Hoffa's interest in rehabilitating the Sun Valley corporation was attributable, in part, to the fact that a board of monitors appointed by a United States District Court had questioned, as a breach of his fiduciary duties, the deposit of his local union's funds in the Florida National Bank (I A. 44). Although the district court excluded evidence regarding the board of monitors and did not, for that reason, read this allegation to the jury, there was substantial evidence before the jury that the deposit in the Florida bank had been questioned by a Senate committee and by a Florida grand jury (see *supra*, p. 6). The fact that the indict-

ment sent to the jury room included the allegation regarding the board of monitors did not, in light of this evidence and the repeated warnings that the indictment was not to be considered as evidence, prejudice the petitioners.

b. The facts established at the post-trial hearing with respect to this incident demonstrate that this is not a case involving impermissible exchanges in the absence of counsel between a deliberating jury and a court. The jury asked no questions of law whatever, nor did it in any manner suggest—as did the jury in *Greene* v. *United States*, No. 181, this Term—that it might not be able to reach agreement. What the jury requested was a "document" which it described in terms leaving little doubt that it was seeking the indictment. That document was sent to it with no substantive communication whatever; if the bailiff said anything when he delivered the indictment it was that that indictment was all the jury would get. In no sense could that remark have affected the jury's deliberations.

This case is, therefore, entirely different from *Shields* v. *United States*, 273 U.S. 583, and the other decisions cited by petitioners, including *Greene* v. *United States*, No. 181, this Term (Pet. 61-64), where supplemental instructions regarding the jury's deliberations were given by the court in the absence of defendants or their counsel.[*] This case involved

[*] The "instructions" in *Greene* were, as we argued in that case, hardly likely to be prejudicial since they consisted only of a directive to "keep deliberating." This case concerns a communication that is even more remotely removed from the substance of the jury's deliberations.

no supplemental instructions, if, in fact, it involved any communication whatever from the court to the jury.

c. There is no substance to petitioners' further contention (not made in the motion for a new trial) that in failing to ascertain the exact nature of the jury inquiry in open court with the assistance of counsel, the trial judge cut off any possibility of correcting any "adverse misconception of some major issue or issues of law or fact or both" which the jury might have had (Pet. 64). The trial judge's delivery of the indictment was prompted basically by his own concern that the jury needed a guide to identify the separate counts, and the jury note merely served to reinforce that view. In any event, the reference in the note to "Document of all counts" and "Document of overt acts named" plainly referred to the indictment.

3. After verdict, petitioners presented an affidavit by alternate juror Pare (I A. 313–314) that on one occasion, during a recess in the trial, while the jury was sequestered at the Great Lakes Naval station, juror Gogerty—who later became foreman of the jury—had shown him a newspaper article from the July 18 edition of the Chicago *Tribune* which referred to the fact that Hoffa's motion for a judgment of acquittal had been denied and that two letters[11] which the government had offered in evidence to discredit the testimony of Dranow had been excluded by the trial judge. (This article is set out in full at I A. 331.) Pare testified that he engaged in no conversation with

[11] These were the "Link-Dranow" letters discussed *infra*, pp. 61–63.

Gogerty or any other juror regarding the article and that he did not overhear any conversation among the jurors relating thereto (III A. 2289-2292). Pare further testified that, during the sequestration, the jury received newspapers from which items had been clipped (III A. 2294)." Pare also testified that prejudicial remarks had been made by jurors during recesses in the trial and that he had kept notes identifying the speakers by different code letters (III A. 2189-2190). The comments allegedly included statements that "there is no honor among thieves"; that the petitioners knew "their goose is cooked or at least in the frying pan"; that the jury was spending a substantial amount of time on the case and the defendants would "just appeal the thing"; and that Hoffa would never go to jail because he had too much money (III A. 2192-2199). Pare also stated that there was very little discussion of the evidence among the jurors (III A. 2203).

Following Pare's testimony, the trial judge rejected the defense request that other jurors be subpoenaed to testify and denied the supplemental motion for a new trial based on Pare's revelations (III A. 2212-2219). This ruling was proper (see Pet. 21-25, 66-69). The one newspaper article did not acquaint the jury with anything which they did not know as a result of the trial. The Link-Dranow letters were

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"The newspapers were screened by the marshals responsible for the sequestration of the jury, and items relating to the trial or to the petitioners were clipped before the newspapers were given to the jurors. The article Gogerty allegedly showed Pare appeared in the back of the newspaper in the section normally reserved for obituaries (III A. 2218).

initially admitted in evidence at trial only against Dranow; they were excluded by a later instruction to the jury that they be disregarded (III A. 2065–2066; see *infra*, p. 63). Nor did the remarks of the jurors, even as reported by Pare, amount to comments on the evidence. His testimony was an inadequate foundation upon which to harass the jurors by inquiring into their conduct during the trial of the case. Cf. *McDonald* v. *Pless*, 238 U.S. 264; *Rees* v. *Peyton*, 341 F. 2d 859, 865 (C.A. 4); *United States* v. *Crosby*, 294 F. 2d 928 (C.A. 2), certiorari denied *sub nom. Mittelman* v. *United States*, 368 U.S. 934; *United States* v. *Grieco*, 261 F. 2d 414, 415 (C.A. 2), certiorari denied, 359 U.S. 907.[*]

4. None of petitioners' allegations concerning publicity presents an issue warranting review (Pet. 25–28, 70–74).

a. Selection of the jury occupied ten days (consuming 2234 pages of the trial record) and over 500 veniremen were questioned before the twelve jurors and four alternates were actually chosen. As each panel of veniremen entered the box, the judge advised the prospective jurors in detail that what was desired were jurors who could put aside any past opinions and reach a decision entirely upon the evidence pre-

[*] *Parker* v. *Gladden*, 385 U.S. 363, is clearly inapposite. There prejudicial comments were made by the bailiff assigned to the sequestered jury. His "official character", as the Court noted, gave him great weight with the jury (385 U.S. at 365). Indeed, one juror testified that he was influenced by the bailiff's comment.

sented in court." Each veniremman was asked if he could meet this standard and those who expressed any doubt were excused (see G. 391–392, 398, 407). At the outset of the *voir dire* the court permitted each side fifteen minutes of personal examination for each panel of four veniremen (I A. 397). This limitation was not strictly enforced at first, but its abuse by the defense compelled the judge to announce that he would use his watch to time the questioning of each (I A. 437). After nine days, it became apparent that the time limitation was "of no avail" (I A. 499), and the judge then announced that he alone would carry on the *voir dire* (I A. 497) permitting each side to ask only three supplementary questions (I A. 499–500). The court's limitation on defense inquiry was plainly a consequence of an abuse of the privilege.

The limitation did not hinder the empanelment of a fair jury. In most instances, a juror as to whom further defense inquiry was foreclosed was in fact challenged, either for cause or peremptorily. Compare *Chaves* v. *United States*, 258 F. 2d 616, 619 (C.A. 10), certiorari denied *sub nom. Tenorio* v. *United States*, 359 U.S. 916. Moreover, numerous veniremen voluntarily admitted the possibility of bias without probing interrogation and were excused; those who remained affirmed their lack of bias. While the trial judge foreclosed dilatory defense inquiries he made sure that the jury chosen would give petitioners a fair trial. The court acted well within its area of discretion. See *Connors* v. *United States*,

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"See G. 382–384, 375, 389, 394–395, 399–400, 394–395, 400–401, 408–410, 415–417, 422–424, 426–427, 434–435, 441–443, 448–449.

158 U.S. 408, 413; *Yarborough* v. *United States*, 230 F. 2d 56, 62 (C.A. 4), certiorari denied, 351 U.S. 969.

b. In view of the general notoriety of the trial and in order to prevent any outside influence from being brought to bear on the jury, the court properly ordered sequestration of the jury. See, e.g., *United States* v. *Holovachka*, 314 F. 2d 345, 352–353 (C.A. 7), certiorari denied, 374 U.S. 809. Nor were petitioners prejudiced because, early in the trial, the court transferred the sequestered jury to the nearby Great Lakes Naval Training Station. That installation offered self-contained separate quarters [a] where the jury could comfortably be housed and yet be within one hour's drive from the courthouse. Since one of the petitioners had recently been convicted of attempting corruptly to influence jurors in a federal criminal trial, it was reasonable for the court in this case to take appropriate precautions. And there is no factual support for petitioners' surmise that the jury was under the control of the military and was therefore unable to afford them a fair trial.

c. The judge demonstrated full awareness of his responsibility to obtain a jury uninfluenced by publicity and to keep newspaper and magazine reports from the jury. There is no reason to suppose that any juror read or was influenced by the pretrial newspaper and magazine articles to which petitioners refer (Pet. 25–27). On the first trial day after the appearance of a Chicago newspaper article concerning a visit of the then Attorney General, the judge specifically

[a] The jury was occupying a separate rented building at the Naval Station (I A. 609).

inquired of the prospective jurors whether they had read anything over the weekend which might affect their verdict (G. 410, 411–413, 425, 432). Those who expressed any doubt as to their ability to be impartial were excused (G. 411–412, 421, 448).

5. It was not error (see Pet. 29–32; 75–80) to permit the prosecutor to cross-examine petitioner Hoffa regarding his conviction for obstruction of justice which was then pending in the Court of Appeals for the Sixth Circuit. That conviction was subsequently affirmed by the court of appeals (349 F. 2d 20) and by this Court (385 U.S. 293).

a. Reference for impeachement purposes to a conviction pending on appeal has been sustained by various courts. *United States* v. *Empire Packing Co.*, 174 F. 2d 16, 20 (C.A. 7), certiorari denied, 337 U.S. 959;[*] *Bloch* v. *United States*, 226 F. 2d 185, 188 (C.A. 9), certiorari denied, 350 U.S. 948; 238 F. 2d 631, 632, certiorari denied, 353 U.S. 959; see *State* v. *Johnson*, 99 Ariz. 52, 53, 406 P. 2d 403, 404 (1965) and cases there collected. The Second Circuit follows no different rule. That circuit's view is only that it will not even question the propriety of such impeachment where the conviction has been affirmed on appeal—a circumstance which is present here. See *United States*

[*] The claim (Pet. 76, n. 33) that the later Seventh Circuit decision in *United States* v. *Levi*, 177 F. 2d 827, is inconsistent with *Empire Packing* was properly rejected by the court below which said that in *Levi* the question had been deemed error "because Government counsel knew or should have known that a judgment of conviction had not been entered in that case, and that the trial court still had the motion for acquittal under consideration" (Pet. App. A 28).

v. Owens, 271 F. 2d 425, 426 (C.A. 2), certiorari denied, 363 U.S. 874; *United States* v. *Cipollo*, 170 F. 2d 311 (C.A. 2). If a valid conviction may be used for impeachment, it would be irrational, we submit, to hold that the cross-examination of a defendant was improper because the jury was permitted to consider his credibility as a witness in light of a conviction which, although it was then being challenged, was subsequently held to be valid. The contrary rule in the District of Columbia Circuit rests, as that court has specifically noted, on its interpretation of a local statute. See, e.g., *Fenwick* v. *United States*, 252 F. 2d 124, 126."

b. There is no factual support for the assertion that the government "manipulated" the sequence of trials in order to obtain a conviction on the obstruction-of-justice charges which might be used for impeachment in this case (Pet. 29–32; Pet. App. A. 32–34). The obstruction-of-justice indictment was returned approximately one month before the indictment in this case (see I A. 342–345, 345–346; G. 1–8), and throughout the fall of 1963 the government, at the district judge's direction, kept the court advised of the status of the obstruction-of-justice case. The trial of that case was delayed because the defendants took interlocutory appeals from the court's disposition of

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"Petitioners' added contention (Pet. 31–32) that the obstruction-of-justice conviction is still not final despite its affirmance because motions for new trials are pending in the court of appeals is plainly unsound. On this theory no conviction would be final, no matter how much time had elapsed since affirmance. Since collateral attack on the conviction is always possible, it could always be contended that the conviction might be upset at some future time.

pre-trial motions (G. 7-8, 12-13) and because an attorney for one of the defendants attempted corruptly to influence a prospective juror (G. 22-23). The record shows that, under the close and continuing supervision of the trial judge in this case, the government was permitted to try the obstruction-of-justice charges first because that indictment was returned first. The mere fact that the present indictment may have borne some factual relation to an indictment naming petitioner Hoffa returned in the Southern District of Florida in 1961—which concerned funds relating to the Sun Valley enterprise but not to the Pension Fund—falls far short of establishing the improper motive which petitioners now ascribe to the government.

c. In any event, petitioners' affirmative use of their failure to object to the question *in the presence of the jury*[*] should foreclose their present claim that permitting the question was error. When Hoffa was asked on cross-examination whether he had been convicted of jury tampering, he replied, "Yes, by perjured testimony of an admitted kidnapper" (103 Tr. 14899; III A. 2001-2002). The defense then asserted no objection, doubtless relying on the fact that the question had been put to the judge before presentation of the defense case and had been ruled on by the court favorably to the government. On redirect examina-

[*] Indeed, petitioners did not assert in the trial court that it would be reversible error—as they now claim—to permit the impeaching question to be asked. One of the defense counsel asserted only that "it's totally a matter of discretion" (G. 187-188).

tion, Hoffa's counsel inquired further regarding the obstruction-of-justice conviction and Hoffa testified that it was then pending on appeal (III A. 2016–2017). In closing argument Hoffa's counsel said (III A. 2086):

> But the first thing that Mr. Bittman [government counsel] went to for Mr. Hoffa, like a grip, and it is proper cross-examination—I didn't object—
>
> 'Are you the James R. Hoffa that was convicted in Chattanooga?'

Counsel then argued that the use of the conviction for impeachment purposes before the appeal had been decided, "speaks ill of the [prosecutor's] confidence in that conviction," and further reflects his desire that "it will make you so prejudiced, so angry at Hoffa, that it will almost make you hate him. * * * I think that they hope that it will make you hate him so that it will blind you in the judgment of this case" (III A. 2086–2087).

In view of this background, petitioners are in no position to argue that reference to the conviction constituted prejudicial error. Experienced trial counsel affirmatively advised the jury that the question was "proper cross-examination" and that he "didn't object" (III A. 2086), thereby implying that the defense welcomed the reference to the conviction because it demonstrated the weakness of the government's case. Having chosen to give the jury the impression that he acceded to the question, petitioner Hoffa should not now be permitted to challenge the court's ruling and to claim that he made a proper objection.

6. The claims of trial error (Pet. 32-36, 80-84) are without merit:

a. The names of the jurors need not, under 28 U.S.C. 1864, be read aloud when drawn. By its express terms, the statute requires only that the names of prospective jurors "shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing." Its mandate is fully satisfied where—as here (see I A. 117, 120, 352, 354-355, 375-377, 383, 387, 390-391)—the drawing is held in a place to which the public has access and where no efforts are made to conceal the fact that a jury is being drawn. *Wilson* v. *United States*, 104 F. 2d 81, 82 (C.A. 5), certiorari denied, 308 U.S. 574, *Hammerschmidt* v. *United States*, 287 Fed. 817, 820 (C.A. 6), reversed on other grounds, 265 U.S. 182, *United States* v. *Standard Oil Company*, 165 F. Supp. 359, 362 (N.D. Ind.). In short, the statute requires a public *drawing*, not a public *announcement* of names.

The decision in *Wagner* v. *United States*, 264 F. 2d 524 (C.A. 9), certiorari denied, 360 U.S. 936, is not to the contrary. While holding that a defendant was not entitled to a list of prospective jurors, the Ninth Circuit observed in that case that it was within the bounds of a trial judge's discretion to *permit* the names of jurors to be read aloud when drawn. It was also within the permissible bounds of the court's discretion in this case to *prohibit* the reading aloud of the jurors' names. After veniremen were either seated or excused, the judge offered defense counsel an opportunity to examine the cards which

had been selected during the public drawing. This adequately insured that the persons examined were, in fact, those whose names had been drawn from the box.

b. Near the close of final argument, the trial judge advised counsel that the 92-year-old mother of juror Lee had undergone major surgery for a broken hip and that her physician did not expect her to survive. The court inquired whether, if Mrs. Lee died during the deliberations, the parties were willing to continue with eleven jurors or whether they would prefer to substitute an alternate juror. Petitioners' counsel argued that juror Lee should be consulted, but that if the court refused to speak to him, an alternate should be substituted (III A. 2094–2107). The court refused to advise juror Lee of the physician's prognosis or to ask him if he would stay in the event of his mother's death (see III A. 2096–2101). Mrs. Lee died a day after the jury verdict (III A. 2207–2208).

Rule 24(c) of the Federal Rules of Criminal Procedure authorizes replacement by alternate jurors if, before deliberation commences, a juror becomes "unable or disqualified to perform" his duties. That language is sufficiently broad to authorize the court to excuse a juror for reasons such as those present here without discussing the question with the juror. It was reasonable for the trial judge to refuse to represent to the juror that his mother was close to death and to conclude, without further consultation, that in the circumstances known to the judge the juror was rendered "unable * * * to perform [his] duties." Indeed, the judge could properly conclude that by

merely advising the juror of the medical prognosis he would be disabling him emotionally from performing such duties.

c. Petitioners' claim that the judge committed prejudicial error in commenting on the inaudibility of the direct examination of government witness Francis Murtha is insubstantial. Murtha was the executive secretary of the Pension Fund and a Teamster organizer who, when acting in this latter capacity, was directly responsible to petitioner Hoffa (I A. 752, 772). He was called as a government witness to identify certain documents. In the course of his testimony, it became clear that he was an unwilling witness, who rarely indicated any independent recollection of the events about which he was questioned (see *e.g.*, G. 49–50; I A. 783, 785), and only hesitantly identified documents and signatures thereon. In a short period during direct examination, he was told on at least six separate occasions—twice when he was inaudible in identifying documents signed by Hoffa and Burris (G. 47, 48)—to keep his voice up and to stop dropping it at the end of a sentence (G. 46, 47, 48, 52, 53). In response to a further inaudible answer, the court, in an obvious attempt to prod a reluctant witness, advised the jury that "they must assume he is speaking in the affirmative. Because he only drops his voice on certain occasions." As the court immediately explained to defense counsel, his purpose was to have them "ask him to talk louder" (G. 54–55, 58).

By this technique the court was trying to make an unwilling witness respond to interrogation. If the defense had any real fear that the jury would take

the court's remarks literally, it could have asked that the question be re-answered when the witness again lapsed into inaudibility. In fact, this was done on several occasions (see, *e.g.*, 27 Tr. 4654, 4686, 4677). If defense counsel were truly concerned over the tenor of the witness' answers, they could have asked the questions again on cross-examination or sought to have the original questions and answers read aloud by the court reporter.

d. In the course of his final instructions the trial judge charged the jury that (III A. 2141):

> One using a fiduciary position, a position of trust, to obtain benefits is not only performing a breach of trust but is performing an act of [*sic:* should read 'active'] fraud.

This instruction was an accurate statement of settled law. See *United States* v. *Groves*, 122 F. 2d 87, 90 (C.A. 2), certiorari denied, 314 U.S. 670; *United States* v. *Buckner*, 108 F. 2d 921, 926 (C.A. 2), certiorari denied, 309 U.S. 669; *Landay* v. *United States*, 108 F. 2d 698 (C.A. 6), certiorari denied, 309 U.S. 681; see also, *Shushan* v. *United States*, 117 F. 2d 110, 115 (C.A. 5), certiorari denied, 313 U.S. 574. There is nothing to the contrary in *Epstein* v. *United States*, 174 F. 2d 754 (C.A. 6), which held that actual fraud (intentional deception to obtain another's property or rights) and not merely constructive fraud (morally guiltless, but unmerited receipt of benefits through the breach of a legal or equitable duty) was contemplated by the mail fraud statute. The decision in *Epstein* did not hold that one who uses his particular position of trust for the specific purpose of obtain-

ing personal benefit does not commit fraud as that term is used in the mail fraud statute. Considered together with the other portions of the instructions, which appropriately emphasized that proof of *scienter*, wilfulness and fraudulent intent were necessary for conviction (*e.g.*, III A. 2140–2146), the challenged instructions could not have been misconstrued by the jury as a direction that culpable intent was not in issue.

7. There was no reason for the trial court, *sua sponte*, to order an examination as to petitioner Dranow's mental competency to stand trial; nor were the other petitioners prejudiced by being tried with him (Pet. 36–53; 84–90).

a. On the first day of jury selection one of Dranow's attorneys, Mr. Ragano, claimed that Dranow did not communicate "coherently" (1 Tr. 4–5). The government pointed out that Dranow had been found competent in connection with another trial in February 1963 (1 Tr. 8–12), and the court noted that three weeks before the instant trial had commenced (April 6, 1964), the report of a medical examination stated that Dranow had "a good contact with reality" (1 Tr. 17). Mr. Schiffer, Dranow's co-counsel, stated that physicians hired by the defense were in the process of examining Dranow and their reports would be ready shortly (1 Tr. 4, 13). The court said it would proceed with the selection of the jury "with the understanding that some doctors are going to examine him. And whenever everybody has got their reports in, if the evidence warrants it, we will suspend the selecting of the jury and have a hearing on his mental condi-

tion and physical condition" (1 Tr. 18). Dranow's counsel agreed that that was "a satisfactory procedure" (1 Tr. 18, 20).

On the following day (Tuesday, April 28, 1964) government counsel presented an order for the court's signature directing that Dranow be examined "by two psychiatrists and one internist" at the Columbia Hospital in North Chicago (2 Tr. 282–283).[46] Mr. Schiffer objected, claiming that the psychiatric reports were not yet ready but were expected "momentarily," and that defense counsel wanted the committee of physicians appointed by the court to have these reports available (2 Tr. 284–286). Mr. Ragano then requested that the matter be put over "until Friday" since, after the reports of the defense physician are in, it might be unnecessary "to conduct such an examination. It is conceivable, of course, that our doctors may report that he is competent" (2 Tr. 287). Dranow himself objected to a competency examination, asking that his own doctor be present, a condition to which the government did not object (2 Tr. 297–298). The court decided to defer the matter until the defense reports and affidavits were filed (2 Tr. 299).

Three days later (Friday, May 1, 1964) the court, noting that no defense material had yet been filed, asked Mr. Ragano what his plans were. Mr. Ragano

[46] In response to defense inquiry, government counsel stated that the three doctors were not on "any government payroll"; that one of the doctors had testified for the government in one case; and that he had no information in this regard as to the other two (2 Tr. 294).

responded that this was a matter Mr. Schiffer handled (2 Tr. 917).

On Monday, May 11, 1964, counsel were advised of a telegram Dranow had sent to the court requesting that he be permitted to represent himself (see Pet. 50–51). Mr. Ragano again argued that Dranow was mentally ill, requested that he be given a psychiatric examination, and that his trial be severed from that of the other defendants (11 Tr. 2240–2241). Government counsel pointed out that the defense had not, as they had represented, submitted any psychiatric reports providing some "foundation in fact" for the claim of mental incompetency (11 Tr. 2242). Dranow was then brought into chambers and said he was willing to proceed with Messrs. Ragano and Schiffer as his counsel (11 Tr. 2258–2259).

Following further discussion the court denied the motions for severance and mental examination (11 Tr. 2260). No psychiatric reports were ever submitted to the court by defense counsel.

b. These facts afford no basis for the belated claim that the trial court should, *sua sponte*, have ordered a mental examination of Dranow. It was defense counsel who asked that such an examination be postponed until the reports of defense psychiatrists were ready. The fact that no such reports were ever submitted constituted an abandonment of the claim of mental incompetency. It could properly have been construed by the court as suggesting that defense psychiatrists had found Dranow competent to stand trial—the conclusion reached after two prior examinations.

The cases cited by petitioners (Pet. 85) are inapposite. In some, there was substantial lay and psychiatric evidence which raised such a "*bona fide* doubt" regarding a defendant's competency to stand trial as to require the trial court to conduct a hearing on its own motion. See *Pate* v. *Robinson*, 383 U.S. 375, 385, 388; *Bishop* v. *United States*, 350 U.S. 961; see also *Hansford* v. *United States*, 365 F. 2d 920, 922 (C.A.D.C.), where the defendant was suffering narcotic withdrawal symptoms during trial, and *Whalen* v. *United States*, 367 F. 2d 468, 470 (C.A. 5), where the defendant attempted suicide prior to trial. Nothing remotely comparable was shown in this case. In *Pouncey* v. *United States*, 349 F. 2d 698 (C.A. D.C.) (Pet. 85–86, 88), the critical facts justifying the court of appeals' conclusion that a remand for a competency hearing was necessary were defendant's claims, made at least twice during trial, that appointed counsel was "in cahoots with the Government," and lay testimony that the defendant was insane. There were no similar incidents or testimony in this case. The excerpts from Dranow's remarks to the judge, quoted in the petition for certiorari (Pet. 38–51), state only that Dranow did not want his lawyers to claim he was insane.

Nor was Dranow's conduct during trial suggestive of irrationality requiring the judge on his own motion to order a competency hearing. Dranow's direct examination leaves no doubt that he understood the nature of the proceedings and was fully able to communicate with counsel and to prepare his defense. His detailed, knowledgable, and exculpating

explanations of the numerous financial transactions about which his counsel inquired make crystal clear that he must have had extensive rational discussions with counsel prior to his taking the stand (see III A. 1860–1885, 1886–1889).

The contentions of the other petitioners (Pet. 90) that it was unfair to try them with petitioner rests essentially on the fact that Dranow had a short temper and was not the kind of a person who would impress a jury. This is not a ground for severance. The evidence of petitioners' involvement in the scheme was more than ample. They should not be heard to complain because they were tried together with someone with whom they chose to associate in the criminal venture. See *United States* v. *Aviles*, 274 F. 2d 179, 193 (C.A. 2), certiorari denied *sub nom. Evola* v. *United States*, 362 U.S. 974; *United States* v. *Bentvena*, 319 F. 2d 916, 930–932 (C.A. 2), certiorari denied *sub nom. Ormento* v. *United States*, 375 U.S. 940.

8. On direct examination, petitioner Dranow testified, *inter alia*, that money used to remove Sun Valley from reorganization was not derived from Pension Fund loan proceeds, that there was no requirement for other petitioners to contribute to that purpose and that he received no finders' fees for obtaining Pension Fund loans (see III A. 1865–1867, 1868). On cross-examination, Dranow was asked whether he had ever written a letter to S. George Burris stating (in pertinent part) that "[e]verything can be blamed on me, and everything that could be put on me to protect others should be blamed on me" (G. 1001; III A. 1910). In response to defense objections to the

question, government counsel stated that his purpose was to impeach the credibility of the witness and that the question would be followed up. The trial judge thereupon overruled the defense objections and instructed the jury to consider the question only as to Dranow (III A. 1911–1914). Dranow responded that the letter was in his handwriting and he must have written it although he had no memory of doing so. Nor did he recall when he had written it, or to whom he had sent it. He also stated that he did not know whether the letter was addressed to S. George Burris since he had several friends named George (III A. 1914–1915).

Dranow was then asked if he had written a letter stating that he wanted sums of money ($10 and $15) put away for him daily, naming various petitioners (Burris, Hyman and Kovens) and referring to certain of the properties involved in some loan transactions (*i.e.*, "The California buildings," and the "Fashion Mart Building") (G. 1002). After defense objections to this question were overruled and the jury was again admonished to consider the inquiry only as against Dranow, he answered that he did not recall writing the letter, but that it was in his handwriting and that therefore he must have written it. He also did not recall whether he had the two letters delivered to Irving Link (G. 195–197).

Link (who was involved in the First Berkeley loans, see *supra*, pp. 22–25) thereafter testified for the government on rebuttal that in September 1962 he had a conversation with Dranow, who was then very distraught, and that Dranow spoke about leaving the coun-

try. Either during this conversation or in a telephone conversation about a week or ten days later, Dranow told Link that there would be mail addressed to one "Buck Traube" which would be for him. Link subsequently picked up an envelope addressed in this manner and found the two letters therein. (III A. 2018–2021). Both before and after Link's testimony, the jury was instructed to consider the evidence only against Dranow (III A. 2018, 2021).

Later in the trial, after extended discussion with counsel, the court concluded that while there was basis for using the letters to impeach Dranow, its relevance in this regard was outweighed by the danger of prejudice to the other defendants (III A. 2054–2062). Accordingly, the court finally instructed the jury that, in arriving at a verdict, they were to disregard the testimony of Dranow and Link relating to the letters (III A. 2065–2066).

Considering the totality of the other evidence against petitioners, together with the fact that the trial judge repeatedly admonished the jury that they were not to consider these letters or the testimony relating thereto against anyone but Dranow, petitioners' claim of prejudice would have failed even if the court had ultimately adhered to its original ruling. *Delli Paoli* v. *United States*, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95. The fact that the court, in an exercise of extreme caution, ultimately excluded the letters altogether does not give petitioner any greater rights in this regard. Cf. *Spencer* v. *Texas*, 385 U.S. 554.

Pursuant to the policy set forth in our Supplemental Memorandum in *Schipani* v. *United States*, No. 504, this Term, 385 U.S. 372, we have conducted a review to determine whether electronic eavesdropping or wiretapping affected the convictions of any of the petitioners. We have found nothing in that review warranting notification to this Court or any further proceedings in this regard with respect to petitioners Hoffa, Dranow, Strate, Weinblatt, Kovens and Hyman. With respect to petitioner Burris, we find that pursuant to the Departmental authorization described at pages 2–3 of the Supplemental Memorandum for the United States in *Black* v. *United States*, 385 U.S. 26 (No. 1029, O.T. 1965), the Federal Bureau of Investigation, on or about January 21, 1963, installed a microphone by trespass in the office of Benjamin Sigelbaum in Miami, Florida, and that petitioner Burris apparently visited Sigelbaum's office on one occasion during the period of this surveillance, which continued to July 12, 1965. At that time Burris engaged in a conversation which was overheard. The only participants in the conversation, which occurred on December 2, 1963 (approximately six months after indictment), and lasted less than half-an-hour, were Burris and Sigelbaum. A verbatim transcript of that conversation appears in the F.B.I. logs.

In substance, Burris discussed his personal financial problems and the possible transfer of his ten percent interest in Sun Valley, Inc., to Sigelbaum. Sigelbaum discussed a prior claim he had against Burris' interest, and Burris told Sigelbaum that he (Burris)

had paid for his interest in Sun Valley by borrowing $57,000 from Irving Kipnis, which he later repaid from a fee given him by Kipnis. Sigelbaum thereafter inquired about the nature of the charge on which Burris had been indicted, asking whether it concerned income tax. Burris replied that it did not and that the government would be unable to prove conspiracy. Sigelbaum named an individual who had experienced difficulty in obtaining a Pension Fund loan and suggested that he might be a good defense witness. Sigelbaum asked about petitioner Hyman and was told by Burris that Hyman had spent the money he had borrowed from the Pension Fund on his projects, albeit not for precisely the items for which he had applied.

The contents of this conversation were summarized in a report which was sent to some of the government attorneys who prosecuted the case, but any information contained therein that was remotely relevant to the facts of this case was already known to them from other sources. The conversation was never used as the basis for any investigative lead by the government attorneys, the Federal Bureau of Investigation or any other government agency. Prior to the overheard conversation, Burris had made the statement regarding the Kipnis loan to Special Agents of the Internal Revenue Service on January 31, 1963, and Kipnis had testified in detail regarding these transactions before the grand jury on September 18, 1962. He also testified fully at trial with regard to this transaction (Tr. 8891–8893). The possible witness mentioned in the conversation never testified, and the government does

not, to this day, know who he is or his relation to any of the parties or transactions involved in this case.

In these circumstances, we make the following observations:

(1) With respect to all petitioners other than Burris, we believe that this Court should act on the petition for certiorari and our brief in opposition on the record presently before it. None of these petitioners was a party to the monitored conversation which, at most, related to a minute, peripheral aspect of the many transactions underlying the charges in this lengthy trial.

Although we emphasize, at the outset, that *none* of the evidence introduced at trial was directly or indirectly obtained by any official impropriety, we believe it is well established that even if the monitoring had produced a lead to a source of evidence which was introduced at trial, the only defendant who could prevent such evidence from being used against him would be the person whose "right of privacy of person or premises" had been invaded. *Wong Sun* v. *United States*, 371 U.S. 471, 491–492, and the many cases that have followed it in the circuit courts of appeal,[*] make

[*] *Armada* v. *United States*, 319 F. 2d 793, 796 (C.A. 5), certiorari denied, 376 U.S. 906; *Staples* v. *United States*, 320 F. 2d 817, 820–821 (C.A. 5); *United States* v. *Haley*, 321 F. 2d 956, 959 (C.A. 6); *Murray* v. *United States*, 333 F. 2d 409, 411–413 (C.A. 10), certiorari denied, 383 U.S. 949; *Fisher* v. *United States*, 324 F. 2d 775, 780 (C.A. 8); *United States* v. *Konigsberg*, 336 F. 2d 844, 846–847 (C.A. 3), certiorari denied, 379 U.S. 933; *Dias-Rosendo* v. *United States*, 357 F. 2d 124, 130–134 (C.A. 9); *Elbel* v. *United States*, 364 F. 2d 127, 136–138 (C.A. 10), certiorari denied, 385 U.S. 1014; *United States* v. *Bosse*, 365 F. 2d 206, 222–223 (C.A. 2); *United States* v. *Granello*, 365 F. 2d 990, 995–996 (C.A. 2), petition for cer-

it clear that even if petitioner Burris were able to object to the use, against him, of evidence obtained as the result of a lead produced by the listening device, his co-defendants would have had no standing to complain of the use of such evidence against them. In *Wong Sun* federal officers arrested James Wah Toy in his home on a narcotics charge. They found no narcotics on the premises, but Toy stated that "Johnny" was selling narcotics. The agents thereupon went to Johnny Yee's house, where Yee produced narcotics and stated that he had obtained them from Wong Sun. Wong Sun was then arrested, and he and Toy were convicted of transporting and concealing narcotics. This Court held that probable cause did not exist for Toy's arrest, that statements made by him at the time of arrest were, therefore, inadmissible against him, and that the narcotics taken from Yee—having been traced as a consequence of Toy's illegal arrest—were also inadmissible against Toy. The Court—apparently unanimously—sustained their admissibility against Wong Sun, however, noting that their exclusion as to Toy was required solely by their tainted relationship to information unlawfully obtained from Toy, and not by any "official impropriety" connected with their surrender by Yee. Their seizure, the Court said, "invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial." 371 U.S. at 492.

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tiorari pending, No. 750, this Term; *United States* v. *Beigel*, 370 F. 2d 751 (C.A. 2), petition for certiorari pending, No. 1120, this Term. See also *People* v. *Portelli*, 15 N.Y. 2d 235, 205 N.E. 2d 587, certiorari denied, 382 U.S. 1009.

Nor does the *Wong Sun* decision stand alone. It was foreshadowed by this Court's holding in *Jones* v. *United States*, 362 U.S. 257, 261, that "to qualify as a 'person aggrieved by an unlawful search and seizure' [within the meaning of Rule 41(e), F.R. Crim.P.] one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." See also *Goldstein v. United States*, 316 U.S. 114. It is quite clear from the facts we recite above that the person "against whom the [electronic] search was directed" was Sigelbaum. Whether Burris—who visited on one occasion during the two-and-one-half-year surveillance—comes within the defined class may be arguable, but there can be no doubt, we submit, that the definition in *Jones* does not encompass the other petitioners who were never on the premises at all.

The fact that this case involves convictions on a conspiracy count does not distinguish it from *Wong Sun* (which, indeed, also involved a trial on a conspiracy charge). Where the very objects taken in an unlawful search and seizure are introduced in evidence against all defendants in a conspiracy case, co-defendants have, on occasion, been granted the benefit of a determination that the seizure violated the constitutional rights of another accused. The theory of this rule is apparently that the evidence is returnable on the demand of that defendant and should not, therefore, be available to the government. *McDonald*

v. *United States*, 335 U.S. 451; *Rosencrans* v. *United States*, 334 F. 2d 738 (C.A. 1); and *Schoeneman* v. *United States*, 317 F. 2d 173 (C.A.D.C.). That rationale has no meaningful application here. No statements made during the monitored conversation were introduced in evidence in this case,[47] and no evidence was obtained by "official impropriety" in the sense that the government would be compelled to return it on demand. Even if Burris had known of the monitoring before trial and had moved to suppress the conversation and all leads obtained therefrom at that time, the government would have been permitted to introduce at trial against the other defendants all the evidence actually used.

We note, in addition, that it is entirely clear from the facts of this case summarized above (pp. 5–31, *supra*), that the transaction discussed by Burris (*i.e.*, the Kipnis loan), was peripheral to the main body of the evidence presented at trial. It related to matters which were not, by any means, confidential, and which were well known to the government both as a result of Kipnis' testimony and from Burris' own statements to investigating agents. The convictions of petitioners other than Burris should not be affected by the outcome of a full factual analysis of this single overheard conversation. As to them, therefore, the petition for certiorari should be considered on its merits.[48]

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[47] No government agent testified at trial regarding any admission made by Burris, nor did Burris testify in his own behalf.

[48] In the particular factual circumstances of *O'Brien* v. *United States*, No. 823, this Term, decided March 20, 1967, which concerned substantially fewer co-defendants, a far less complex

(2) With respect to petitioner Burris we emphasize here—as we did in making a similar disclosure in our brief in opposition in *Granello* v. *United States,* No. 750, this Term—that there is and should be a substantial difference between monitoring of consultations between an accused and his counsel and monitoring which, although violative of the Fourth Amendment, does not infringe upon the privacy of attorney-client conferences. In *Black* v. *United States,* 385 U.S. 26, and *O'Brien* v. *United States,* No. 823, this Term, decided March 20, 1967, discussions between an indicted accused and the attorney representing him on that charge were overheard. This Court held that the most appropriate means of removing any doubt as to the fairness of a trial which followed such monitoring was to allow the factual isues to be fully litigated before or during trial. Accordingly, new trials were ordered in both cases.

The present case concerns no intrusion whatever upon attorney-client discussions. It involves a single half-hour conversation between an accused and his acquaintance that was peripherally relevant to the charges underlying the accused's conviction. The discovery, at this juncture, of the impermissible

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charge and monitoring of a consultation with an attorney, we did not assert the co-defendant Parisi's lack of standing as a ground for sustaining his conviction. That case, however, involved the overhearing of conversations with an attorney. While we were of the opinion that it was questionable whether the overheard conversations affected the Sixth Amendment rights of O'Brien, we could not know the degree of relationships among co-counsel so as to be certain whether the Sixth Amendment rights of the co-defendant could be said to have been invaded.

governmental conduct should no more affect petitioner Burris' conviction than would a similar discovery that, unknown to him, his automobile or his residence had been searched by some agency of the federal government. The validity of his conviction would then be drawn in question only if the government were unable to show that the evidence used against him at trial was untainted—*i.e.*, that it had not derived "from an independent source" within the meaning of *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392.

The circumstances of this case illustrate graphically the disproportionate consequences which would result from an inflexible rule applying the result of the *Black* and *O'Brien* cases to all situations where the government learns, while appellate proceedings are pending, that a convicted defendant had, on some occasion prior to his trial, visited premises which were being monitored and had there engaged in a conversation having some arguable relevance to the charges against him. For if this Court were to apply to petitioner Burris the remedy it has afforded in the *Black* and *O'Brien* cases without any judicial finding that evidence introduced against him was tainted, it would be vitiating, merely because of a remote and theoretical possibility of prejudice, a conviction of a principal defendant in a trial which lasted 13 weeks and required the testimony of approximately 140 government witnesses—one of whom, Stanton Sanson, a central figure in the development of the conspiracy (see pp. 8–9, *supra*), has died in the interim.

That result is not justified, we submit, as a prophylactic measure to deter electronic surveillance by government agents, since the overhearing of Burris' conversation was not purposeful. It is quite clear that in monitoring Sigelbaum's office, the agents were not seeking to obtain evidence against Burris—who happened, quite fortuitously, to visit the premises on a single occasion over a two-and-a-half-year period and engage in a half-hour conversation with the occupant. Nor is this a case like *Black* v. *United States*, 385 U.S. 26, where, because of the extended duration of the monitoring of the accused or the fact that conferences with an attorney had been overheard, this Court concluded that it was necessary to conduct a totally new proceeding in order to insure that the conviction was based upon a demonstrably fair trial. The log of the conversation in this case is ten pages long, and there is no real difficulty in comparing it with the evidence introduced against Burris and with the information already in the possession of the prosecutors at the time of the overheard conversation.

(3) We recognize that when, as is true here, the conversation relates, albeit in a peripheral manner, to the subject-matter of the indictment, the person overheard is entitled to a judicial determination on the question whether evidence used against him was obtained by the exploitation of such monitoring. On the other hand, we call the Court's attention to the fact that the monitoring of Sigelbaum's office became

public knowledge several months ago [49] and that Burris has made no effort since that time to seek hearings directed towards that issue in the district court. While we do not, in all the circumstances, oppose a remand of petitioner Burris' case to the district court for this limited purpose, we firmly believe (for the reasons set out at pp. 66–72, *supra*) that such a remedy would be appropriate with respect to him alone and that any more drastic relief even with respect to his conviction would be inconsistent with this Court's decisions in the area of the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied as to petitioners Hoffa, Dranow, Strate, Weinblatt, Kovens and Hyman. As for petitioner Burris, we suggest that this Court could (1) deny his petition without prejudice to the filing of appropriate motions in the district court or (2) grant the petition and remand the case to the district court for a hearing on the question whether tainted evidence was used against him. At such a hearing the government would produce the F.B.I. log and the report based upon it and would demonstrate that it bore only peripherally upon the evidence ad-

[49] It was disclosed during pretrial proceedings in an unrelated criminal trial which was fully reported in the press. See N.Y. Times, Nov. 17, 1966, p. 21. Apparently as a result of that public disclosure, it was relied upon in a motion filed in another case in this Court. See "Motion for Relief," *Hoffa et al.* v. *United States*, Nos. 32–35, this Term, pp. 11a–13a.

duced at trial and that, even to that limited extent, no information was supplied that the government did not already have from independent sources.

Respectfully submitted.

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APRIL 1967.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 765

JAMES R. HOFFA, ZACHARY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT, AND CALVIN KOVENS, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 788

BENJAMIN DRANOW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted, after a jury trial in the United States District Court for the Northern District of Illinois in August 1964, of conspiracy and mail and wire fraud, and were variously sentenced to fines and terms of imprisonment. The convictions were affirmed on appeal by the court of appeals for the Seventh Circuit with one judge dissenting (Pet.

No. 765, App. 1–71; 367 F. 2d 698), and a petition for a rehearing *en banc* was denied with two judges dissenting (Pet. App. 73). In its response to a petition for a writ of certiorari (No. 1003, O.T., 1966), the government disclosed that it had electronically overheard a conversation between petitioner Burris and one Benjamin Sigelbaum, at the latter's office seven months prior to trial, in which Burris discussed certain matters at most peripherally relevant to the case; these overhearings were neither introduced into evidence nor used as the basis for any investigative leads. On May 22, 1967, this Court remanded the case to the district court for a hearing to determine whether that or any other electronically overheard conversation had tainted any of the convictions (Pet. App. 74–77; 387 U.S. 231).

After an evidentiary hearing, the district court found that none of the convictions had been tainted either by the overheard Burris-Sigelbaum conversation (the record of which was turned over to petitioners) or by nine additional overhearings of conversations in which various of petitioners were possible participants (the records of which were tendered to the court for *in camera* inspection as to relevancy) (Pet. App. 78–90; 273 F. Supp. 141). The court of appeals again affirmed with one judge dissenting (Pet. App. 91–117; 402 F. 2d 380), and rehearing was denied (Pet. App. 119). On subsequent petitions for writs of certiorari (Nos. 895 and 911, O.T., 1968),[1] this

[1] Dranow petitioned separately (No. 911). However, except as to arguments relating to his mental competency he adopted the arguments presented by the other petitioners, and the government filed a single response to the two petitions.

Court remanded the case along with a number of other cases (*sub nom. Giordano* v. *United States*, 394 U.S. 310) for further proceedings in conformity with *Alderman* v. *United States*, 394 U.S. 165, which held that a defendant who is electronically overheard is entitled to a taint hearing at which all "surveillance records as to which [he] has standing to object" are "turned over to him without being screened *in camera*" for relevancy. 394 U.S. at 182.

After a second evidentiary hearing, at which the records of the nine overhearings (as well as records of five additional overhearings of certain of petitioners' attorneys which had been tendered to the court of appeals for *in camera* inspection during the second appeal) were turned over to petitioners, the district court again found that none of the convictions had been tainted by eavesdropping. The court of appeals once again affirmed, with one judge concurring on the latest eavesdropping issue but adhering to his original dissents in the earlier appeals (Pet. App. 121–129). The instant petitions followed.

1. Petitioners make no claim that any of the overhearings which were the basis for the second remand and the subjects of the second district court hearing in any way tainted their convictions. Rather, they submit for this Court's consideration the question whether their convictions should be reversed on the claim that "the District Court has failed to hold the full adversary hearing directed by the opinion of this Court for development and consideration of the effect of eavesdropping upon the conviction" (Pet. No. 765, p. 4, question XIII). They have failed, however, to

support their contention that the hearing was inadequate with any argument, record citation, or summation or description of the hearing. We therefore rest on the opinion of the court of appeals which fully answers this claim.[2]

2. The main thrust of the petitions[3] is a restatement of the same assertions of error and arguments which were presented in the prior petitions in this case and answered in lengthy detail in one or the other of our two prior briefs in opposition. We rely upon our two prior briefs with respect to these matters, and are filing herewith ten additional copies of each for distribution to the Court. For the Court's convenience, we shall simply summarize petitioners' contentions and specify where our responses to these contentions may be found in our earlier briefs in opposition.

Petitioners' claim that the trial court violated their Sixth Amendment rights in sending the indictment to the jury in their absence and the absence of their counsel (Pt. I) is answered at pages 39–44 of the brief in opposition which we filed in No. 1003, O.T. 1966. The assertion of error in the trial court's failure to conduct a post-trial interrogation of the jury

[2] After full consideration of the record, the court of appeals held that petitioners had received a fair hearing (Pet. App. 125), that the government's disclosure had been complete (Pet. App. 128), that there was no "burden of proof" which the government had failed to meet (Pet. App. 129), and that petitioners had demonstrated no right to or need for the production, which they had demanded, of records of other overheard conversations (not involving them) in Sigelbaum's office (Pet. App. 127) or of "air tels" (Pet. App. 128).

[3] Dranow has again petitioned separately, but has adopted the contentions raised in No. 765.

on the basis of the post-trial affidavit of alternate juror Pare (Pt. II) is answered at pages 44–46 of our brief in No. 1003. The claim that the conviction was tainted by the Burris-Sigelbaum overhearing (Pt. III) is answered at pages 25–29 of the brief in opposition which we filed in Nos. 895 and 911, O.T. 1968.[4] The contentions that the government's failure to disclose during trial that overhearings had taken place constituted violations of the "Jencks Act," 18 U.S.C. 3500 (Pt. IV) and of the principle of *Brady* v. *Maryland*, 373 U.S. 83 (Pt. V) are answered, respectively, at pages 30–32 and page 33 of our brief in Nos. 895 and 911. The assertion concerning the standard of proof the government must bear to establish lack of taint from that overhearing (Pt. VI) is answered at page 25, note 23, of our brief in Nos. 895 and 911. The complaint that the trial court's cautionary instruction was insufficient to undo the prejudice caused the remaining defendants by the introduction against Dranow for impeachment purposes of letters which he had written (Pt. VII) is answered at pages 42–43 of our brief in Nos. 895 and 911.

The contention that the trial court did not adequately instruct the jury that it must find a specific intent to defraud (Pt. VIII) is answered at pages 56–57 of our brief in No. 1003. The assertion that

[4] We point out additionally that as a consequence of this Court's holding in *Alderman* (decided after we filed our brief in opposition in Nos. 895 and 911, in the 1968 term) standing is limited to the defendant who is overheard and does not extend to his co-defendants (394 U.S. at 171–172); accordingly no petitioner other than Burris can complain of the Burris-Sigelbaum overhearing.

petitioners were tried for multiple conspiracies improperly presented as a single conspiracy (Pt. IX) is answered at pages 33–39 of our brief in No. 1003. The complaint that the trial judge refused to grant the remaining defendants a severance from, or order a mental examination of, Dranow (Pt. X) is answered at pages 57–63 of our brief in No. 1003. The objection to the use of Hoffa's then nonfinal conviction in another case for impeachment purposes (Pt. XI) is answered at pages 49–52 of our brief in No. 1003. Finally, the objection to the removal of a juror whose mother was critically ill (Pt. XII) is answered at pages 54–55 of our brief in No. 1003.

It is therefore respectfully submitted, for the reasons stated herein and in our briefs in opposition in No. 1003, O.T. 1966, and Nos. 895 and 911, O.T. 1968, that the petitions for writs of certiorari should be denied.

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